UNITED STATES REPORTS

VOLUME 392

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1967

JUNE 10 THROUGH JUNE 17, 1968
END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ABE FORTAS, Associate Justice.
THURGOOD MARSHALL, Associate Justice.

RETIRED.

STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

RAMSEY CLARK, Attorney General.
ERWIN N. GRISWOLD, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

394520

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ABE FORTAS, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, THURGOOD MARSHALL, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 9, 1967.

(For next previous allotment, see 382 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1967.

TERRY *v.* OHIO.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 67. Argued December 12, 1967.—Decided June 10, 1968.

A Cleveland detective (McFadden), on a downtown beat which he had been patrolling for many years, observed two strangers (petitioner and another man, Chilton) on a street corner. He saw them proceed alternately back and forth along an identical route, pausing to stare in the same store window, which they did for a total of about 24 times. Each completion of the route was followed by a conference between the two on a corner, at one of which they were joined by a third man (Katz) who left swiftly. Suspecting the two men of "casing a job, a stick-up," the officer followed them and saw them rejoin the third man a couple of blocks away in front of a store. The officer approached the three, identified himself as a policeman, and asked their names. The men "mumbled something," whereupon McFadden spun petitioner around, patted down his outside clothing, and found in his overcoat pocket, but was unable to remove, a pistol. The officer ordered the three into the store. He removed petitioner's overcoat, took out a revolver, and ordered the three to face the wall with their hands raised. He patted down the outer clothing of Chilton and Katz and seized a revolver from Chilton's outside overcoat pocket. He did not put his hands under the outer garments of Katz (since he discovered nothing in his pat-down which might have been a weapon), or under petitioner's or Chilton's outer garments until he felt the guns. The three were taken to the police station. Petitioner and Chilton were charged with carrying

concealed weapons. The defense moved to suppress the weapons. Though the trial court rejected the prosecution theory that the guns had been seized during a search incident to a lawful arrest, the court denied the motion to suppress and admitted the weapons into evidence on the ground that the officer had cause to believe that petitioner and Chilton were acting suspiciously, that their interrogation was warranted, and that the officer for his own protection had the right to pat down their outer clothing having reasonable cause to believe that they might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. Petitioner and Chilton were found guilty, an intermediate appellate court affirmed, and the State Supreme Court dismissed the appeal on the ground that "no substantial constitutional question" was involved. *Held:*

1. The Fourth Amendment right against unreasonable searches and seizures, made applicable to the States by the Fourteenth Amendment, "protects people, not places," and therefore applies as much to the citizen on the streets as well as at home or elsewhere. Pp. 8–9.

2. The issue in this case is not the abstract propriety of the police conduct but the admissibility against petitioner of the evidence uncovered by the search and seizure. P. 12.

3. The exclusionary rule cannot properly be invoked to exclude the products of legitimate and restrained police investigative techniques; and this Court's approval of such techniques should not discourage remedies other than the exclusionary rule to curtail police abuses for which that is not an effective sanction. Pp. 13–15.

4. The Fourth Amendment applies to "stop and frisk" procedures such as those followed here. Pp. 16–20.

(a) Whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person within the meaning of the Fourth Amendment. P. 16.

(b) A careful exploration of the outer surfaces of a person's clothing in an attempt to find weapons is a "search" under that Amendment. P. 16.

5. Where a reasonably prudent officer is warranted in the circumstances of a given case in believing that his safety or that of others is endangered, he may make a reasonable search for weapons of the person believed by him to be armed and dangerous

regardless of whether he has probable cause to arrest that individual for crime or the absolute certainty that the individual is armed. Pp. 20–27.

(a) Though the police must whenever practicable secure a warrant to make a search and seizure, that procedure cannot be followed where swift action based upon on-the-spot observations of the officer on the beat is required. P. 20.

(b) The reasonableness of any particular search and seizure must be assessed in light of the particular circumstances against the standard of whether a man of reasonable caution is warranted in believing that the action taken was appropriate. Pp. 21–22.

(c) The officer here was performing a legitimate function of investigating suspicious conduct when he decided to approach petitioner and his companions. P. 22.

(d) An officer justified in believing that an individual whose suspicious behavior he is investigating at close range is armed may, to neutralize the threat of physical harm, take necessary measures to determine whether that person is carrying a weapon. P. 24.

(e) A search for weapons in the absence of probable cause to arrest must be strictly circumscribed by the exigencies of the situation. Pp. 25–26.

(f) An officer may make an intrusion short of arrest where he has reasonable apprehension of danger before being possessed of information justifying arrest. Pp. 26–27.

6. The officer's protective seizure of petitioner and his companions and the limited search which he made were reasonable, both at their inception and as conducted. Pp. 27–30.

(a) The actions of petitioner and his companions were consistent with the officer's hypothesis that they were contemplating a daylight robbery and were armed. P. 28.

(b) The officer's search was confined to what was minimally necessary to determine whether the men were armed, and the intrusion, which was made for the sole purpose of protecting himself and others nearby, was confined to ascertaining the presence of weapons. Pp. 29–30.

7. The revolver seized from petitioner was properly admitted into evidence against him, since the search which led to its seizure was reasonable under the Fourth Amendment. Pp. 30–31.

Affirmed.

Louis Stokes argued the cause for petitioner. With him on the brief was *Jack G. Day*.

Reuben M. Payne argued the cause for respondent. With him on the brief was *John T. Corrigan*.

Briefs of *amici curiae*, urging reversal, were filed by *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Melvyn Zarr*, and *Anthony G. Amsterdam* for the NAACP Legal Defense and Educational Fund, Inc., and by *Bernard A. Berkman, Melvin L. Wulf*, and *Alan H. Levine* for the American Civil Liberties Union et al.

Briefs of *amici curiae*, urging affirmance, were filed by *Solicitor General Griswold, Assistant Attorney General Vinson, Ralph S. Spritzer, Beatrice Rosenberg*, and *Mervyn Hamburg* for the United States; by *Louis J. Lefkowitz, pro se, Samuel A. Hirshowitz*, First Assistant Attorney General, and *Maria L. Marcus* and *Brenda Soloff*, Assistant Attorneys General, for the Attorney General of New York; by *Charles Moylan, Jr., Evelle J. Younger*, and *Harry Wood* for the National District Attorneys' Assn., and by *James R. Thompson* for Americans for Effective Law Enforcement.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary.[1] Following

[1] Ohio Rev. Code § 2923.01 (1953) provides in part that "[n]o person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person." An exception is made for properly authorized law enforcement officers.

the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton,[2] by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case when I looked over they didn't look right to me at the time."

His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet

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[2] Terry and Chilton were arrested, indicted, tried, and convicted together. They were represented by the same attorney, and they made a joint motion to suppress the guns. After the motion was denied, evidence was taken in the case against Chilton. This evidence consisted of the testimony of the arresting officer and of Chilton. It was then stipulated that this testimony would be applied to the case against Terry, and no further evidence was introduced in that case. The trial judge considered the two cases together, rendered the decisions at the same time and sentenced the two men at the same time. They prosecuted their state court appeals together through the same attorney, and they petitioned this Court for certiorari together. Following the grant of the writ upon this joint petition, Chilton died. Thus, only Terry's conviction is here for review.

away from the two men. "I get more purpose to watch them when I seen their movements," he testified. He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time Officer McFadden had become thoroughly suspicious. He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up," and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun." Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the street corner. Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, iden-

tified himself as a police officer and asked for their names. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38-caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer

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McFadden had had probable cause to arrest the men before he patted them down for weapons. However, the court denied the defendants' motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

After the court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The court adjudged them guilty, and the Court of Appeals for the Eighth Judicial District, Cuyahoga County, affirmed. *State* v. *Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). The Supreme Court of Ohio dismissed their appeal on the ground that no "substantial constitutional question" was involved. We granted certiorari, 387 U. S. 929 (1967), to determine whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp* v. *Ohio*, 367 U. S. 643 (1961). We affirm the conviction.

I.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." This inestimable right of

personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized,

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co.* v. *Botsford,* 141 U. S. 250, 251 (1891).

We have recently held that "the Fourth Amendment protects people, not places," *Katz* v. *United States,* 389 U. S. 347, 351 (1967), and wherever an individual may harbor a reasonable "expectation of privacy," *id.,* at 361 (MR. JUSTICE HARLAN, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins* v. *United States,* 364 U. S. 206, 222 (1960). Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. *Beck* v. *Ohio,* 379 U. S. 89 (1964); *Rios* v. *United States,* 364 U. S. 253 (1960); *Henry* v. *United States,* 361 U. S. 98 (1959); *United States* v. *Di Re,* 332 U. S. 581 (1948); *Carroll* v. *United States,* 267 U. S. 132 (1925). The question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely

presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk"—as it is sometimes euphemistically termed—suspicious persons.

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and between a "frisk" and a "search." [3] Thus, it is argued, the police should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal "arrest," and a full incident "search" of the person. This scheme is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and petty indignity," [4] which can properly be imposed upon the

[3] Both the trial court and the Ohio Court of Appeals in this case relied upon such a distinction. *State* v. *Terry*, 5 Ohio App. 2d 122, 125–130, 214 N. E. 2d 114, 117–120 (1966). See also, *e. g.*, *People* v. *Rivera*, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied, 379 U. S. 978 (1965); Aspen, Arrest and Arrest Alternatives: Recent Trends, 1966 U. Ill. L. F. 241, 249–254; Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942); Note, Stop and Frisk in California, 18 Hastings L. J. 623, 629–632 (1967).

[4] *People* v. *Rivera*, *supra*, n. 3, at 447, 201 N. E. 2d, at 36, 252 N. Y. S. 2d, at 464.

citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.[5]

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment.[6] It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution. Acquiescence by the courts in the compulsion inherent

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[5] The theory is well laid out in the *Rivera* opinion:

"[T]he evidence needed to make the inquiry is not of the same degree of conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed. . . .

. . . . . .

"And as the right to stop and inquire is to be justified for a cause less conclusive than that which would sustain an arrest, so the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search. Ultimately the validity of the frisk narrows down to whether there is or is not a right by the police to touch the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing—senses upon which police customarily act." *People* v. *Rivera*, 14 N. Y. 2d 441, 445, 447, 201 N. E. 2d 32, 34, 35, 252 N. Y. S. 2d 458, 461, 463 (1964), cert. denied, 379 U. S. 978 (1965).

[6] See, *e. g.*, Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?, 51 J. Crim. L. C. & P. S. 402 (1960).

in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in "the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities.[7]

In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street. The State has characterized the issue here as "the right of a police officer . . . to make an on-the-street stop, interrogate and pat down for weapons (known in street vernacular as 'stop and frisk')."[8] But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. See *Weeks* v. *United States*, 232 U. S. 383, 391–393 (1914). Thus its major thrust is a deterrent one, see *Linkletter* v. *Walker*, 381 U. S. 618, 629–635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961). The rule also serves another vital function—"the imperative of judicial integrity." *Elkins*

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[7] See n. 11, *infra*.

[8] Brief for Respondent 2.

v. *United States*, 364 U. S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.[9] Doubtless some

[9] See L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment 18–56 (1967). This sort of police conduct may, for example, be designed simply to help an intoxicated person find his way home, with no intention of arresting him unless he becomes obstreperous. Or the police may be seeking to mediate a domestic

police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police,[10] it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain,[11] will not be

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quarrel which threatens to erupt into violence. They may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them. Or they may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.

[10] See Tiffany, McIntyre & Rotenberg, *supra*, n. 9, at 100–101; Comment, 47 Nw. U. L. Rev. 493, 497–499 (1952).

[11] The President's Commission on Law Enforcement and Administration of Justice found that "[i]n many communities, field interrogations are a major source of friction between the police and minority groups." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967). It was reported that the friction caused by "[m]isuse of field interrogations" increases "as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." *Id.*, at 184. While the frequency with which "frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, see Tiffany, McIntyre & Rotenberg, *supra*, n. 9, at 47–48, it cannot help but be a severely exacerbating factor in police-community ten-

stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.

Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.

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sions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets." *Ibid.*

Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.

II.

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution.[12] We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure

[12] In this case, for example, the Ohio Court of Appeals stated that "we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment, and probable cause is essential." *State* v. *Terry*, 5 Ohio App. 2d 122, 130, 214 N. E. 2d 114, 120 (1966). See also, *e. g.*, *Ellis* v. *United States*, 105 U. S. App. D. C. 86, 88, 264 F. 2d 372, 374 (1959); Comment, 65 Col. L. Rev. 848, 860, and n. 81 (1965).

performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." [13] It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.[14]

The danger in the logic which proceeds upon distinctions between a "stop" and an "arrest," or "seizure" of the person, and between a "frisk" and a "search" is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact beween the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.[15] This Court has held in

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[13] Consider the following apt description:

"[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." Priar & Martin, Searching and Disarming Criminals, 45 J. Crim. L. C. & P. S. 481 (1954).

[14] See n. 11, *supra,* and accompanying text.

We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.

[15] These dangers are illustrated in part by the course of adjudication in the Court of Appeals of New York. Although its first decision in this area, *People* v. *Rivera,* 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied, 379 U. S. 978 (1965), rested squarely on the notion that a "frisk" was not a "search," see nn. 3–5, *supra,* it was compelled to recognize in *People* v. *Taggart,*

the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. *Kremen* v. *United States*, 353 U. S. 346 (1957); *Go-Bart Importing Co.* v.

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20 N. Y. 2d 335, 342, 229 N. E. 2d 581, 586, 283 N. Y. S. 2d 1, 8 (1967), that what it had actually authorized in *Rivera* and subsequent decisions, see, *e. g.*, *People* v. *Pugach*, 15 N. Y. 2d 65, 204 N. E. 2d 176, 255 N. Y. S. 2d 833 (1964), cert. denied, 380 U. S. 936 (1965), was a "search" upon less than probable cause. However, in acknowledging that no valid distinction could be maintained on the basis of its cases, the Court of Appeals continued to distinguish between the two in theory. It still defined "search" as it had in *Rivera*—as an essentially unlimited examination of the person for any and all seizable items—and merely noted that the cases had upheld police intrusions which went far beyond the original limited conception of a "frisk." Thus, principally because it failed to consider limitations upon the scope of searches in individual cases as a potential mode of regulation, the Court of Appeals in three short years arrived at the position that the Constitution must, in the name of necessity, be held to permit unrestrained rummaging about a person and his effects upon mere suspicion. It did apparently limit its holding to "cases involving serious personal injury or grave irreparable property damage," thus excluding those involving "the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like." *People* v. *Taggart*, *supra*, at 340, 214 N. E. 2d, at 584, 283 N. Y. S. 2d, at 6.

In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. Cf. *Brinegar* v. *United States*, 338 U. S. 160, 183 (1949) (Mr. Justice Jackson, dissenting). Compare *Camara* v. *Municipal Court*, 387 U. S. 523, 537 (1967). This seems preferable to an approach which attributes too much significance to an overly technical definition of "search," and which turns in part upon a judge-made hierarchy of legislative enactments in the criminal sphere. Focusing the inquiry squarely on the dangers and demands of the particular situation also seems more likely to produce rules which are intelligible to the police and the public alike than requiring the officer in the heat of an unfolding encounter on the street to make a judgment as to which laws are "of limited public consequence."

United States, 282 U. S. 344, 356–358 (1931); see *United States* v. *Di Re*, 332 U. S. 581, 586–587 (1948). The scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring); see, *e. g.*, *Preston* v. *United States*, 376 U. S. 364, 367–368 (1964); *Agnello* v. *United States*, 269 U. S. 20, 30–31 (1925).

The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

In this case there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did.[16] And in determining whether the seizure and search were "unreasonable" our inquiry

[16] We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

III.

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, see, *e. g., Katz* v. *United States,* 389 U. S. 347 (1967); *Beck* v. *Ohio,* 379 U. S. 89, 96 (1964); *Chapman* v. *United States,* 365 U. S. 610 (1961), or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances, see, *e. g., Warden* v. *Hayden,* 387 U. S. 294 (1967) (hot pursuit); cf. *Preston* v. *United States,* 376 U. S. 364, 367–368 (1964). But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.[17]

Nonetheless, the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon

[17] See generally Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L. C. & P. S. 393, 396–403 (1963).

the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535, 536–537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.[18] The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[19] And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts

[18] This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence. See *Beck* v. *Ohio*, 379 U. S. 89, 96–97 (1964); *Ker* v. *California*, 374 U. S. 23, 34–37 (1963); *Wong Sun* v. *United States*, 371 U. S. 471, 479–484 (1963); *Rios* v. *United States*, 364 U. S. 253, 261–262 (1960); *Henry* v. *United States*, 361 U. S. 98, 100–102 (1959); *Draper* v. *United States*, 358 U. S. 307, 312–314 (1959); *Brinegar* v. *United States*, 338 U. S. 160, 175–178 (1949); *Johnson* v. *United States*, 333 U. S. 10, 15–17 (1948); *United States* v. *Di Re*, 332 U. S. 581, 593–595 (1948); *Husty* v. *United States*, 282 U. S. 694, 700–701 (1931); *Dumbra* v. *United States*, 268 U. S. 435, 441 (1925); *Carroll* v. *United States*, 267 U. S. 132, 159–162 (1925); *Stacey* v. *Emery*, 97 U. S. 642, 645 (1878).

[19] See, *e. g.*, *Katz* v. *United States*, 389 U. S. 347, 354–357 (1967); *Berger* v. *New York*, 388 U. S. 41, 54–60 (1967); *Johnson* v. *United States*, 333 U. S. 10, 13–15 (1948); cf. *Wong Sun* v. *United States*, 371 U. S. 471, 479–480 (1963). See also *Aguilar* v. *Texas*, 378 U. S. 108, 110–115 (1964).

available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Cf. *Carroll* v. *United States*, 267 U. S. 132 (1925); *Beck* v. *Ohio*, 379 U. S. 89, 96–97 (1964).[20] Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, *e. g.*, *Beck* v. *Ohio*, *supra*; *Rios* v. *United States*, 364 U. S. 253 (1960); *Henry* v. *United States*, 361 U. S. 98 (1959). And simple " 'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck* v. *Ohio*, *supra*, at 97.

Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people

[20] See also cases cited in n. 18, *supra*.

in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.

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Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.[21]

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe,

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[21] Fifty-seven law enforcement officers were killed in the line of duty in this country in 1966, bringing the total to 335 for the seven-year period beginning with 1960. Also in 1966, there were 23,851 assaults on police officers, 9,113 of which resulted in injuries to the policemen. Fifty-five of the 57 officers killed in 1966 died from gunshot wounds, 41 of them inflicted by handguns easily secreted about the person. The remaining two murders were perpetrated by knives. See Federal Bureau of Investigation, Uniform Crime Reports for the United States—1966, at 45–48, 152 and Table 51.

The easy availability of firearms to potential criminals in this country is well known and has provoked much debate. See, *e. g.*, President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 239–243 (1967). Whatever the merits of gun-control proposals, this fact is relevant to an assessment of the need for some form of self-protective search power.

though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. Petitioner contends that such an intrusion is permissible only incident to a lawful arrest, either for a crime involving the possession of weapons or for a crime the commission of which led the officer to investigate in the first place. However, this argument must be closely examined.

Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause to make an arrest; nor does he deny that police officers in properly discharging their investigative function may find themselves confronting persons who might well be armed and dangerous. Moreover, he does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or "mere" evidence, incident to the arrest.

There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston* v. *United States*, 376 U. S. 364, 367 (1964), is also justified on other grounds, *ibid.*, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to

arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.

A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here—the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.[22] The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for

[22] See generally W. LaFave, Arrest—The Decision to Take a Suspect into Custody 1–13 (1965).

the purpose of prosecuting him for a crime. Petitioner's reliance on cases which have worked out standards of reasonableness with regard to "seizures" constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. See *Camara* v. *Municipal Court, supra.*

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. *Beck* v. *Ohio,* 379 U. S. 89, 91 (1964); *Brinegar* v. *United States,* 338 U. S. 160, 174–176 (1949); *Stacey* v. *Emery,* 97 U. S. 642, 645 (1878).[23] And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Cf. *Brinegar* v. *United States supra.*

IV.

We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their in-

[23] See also cases cited in n. 18, *supra.*

ception and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a "stick-up." We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the

scope of governmental action as by imposing preconditions upon its initiation. Compare *Katz* v. *United States*, 389 U. S. 347, 354–356 (1967). The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself." *United States* v. *Poller*, 43 F. 2d 911, 914 (C. A. 2d Cir. 1930); see, *e. g.*, *Linkletter* v. *Walker*, 381 U. S. 618, 629–635 (1965); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Elkins* v. *United States*, 364 U. S. 206, 216–221 (1960). Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring).

We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. See *Sibron* v. *New York*, *post*, p. 40, decided today. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See *Preston* v. *United States*, 376 U. S. 364, 367 (1964). The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had

felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

V.

We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in *Katz* v. *United States* and the concurring opinion in *Warden* v. *Hayden*.

MR. JUSTICE HARLAN, concurring.

While I unreservedly agree with the Court's ultimate holding in this case, I am constrained to fill in a few gaps, as I see them, in its opinion. I do this because what is said by this Court today will serve as initial guidelines for law enforcement authorities and courts throughout the land as this important new field of law develops.

A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is of course bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court. Since the question in this and most cases is whether evidence produced by a frisk is admissible, the problem is to determine what makes a frisk reasonable.

If the State of Ohio were to provide that police officers could, on articulable suspicion less than probable cause, forcibly frisk and disarm persons thought to be carrying concealed weapons, I would have little doubt that action taken pursuant to such authority could be constitutionally reasonable. Concealed weapons create an im-

mediate and severe danger to the public, and though that danger might not warrant routine general weapons checks, it could well warrant action on less than a "probability." I mention this line of analysis because I think it vital to point out that it cannot be applied in this case. On the record before us Ohio has not clothed its policemen with routine authority to frisk and disarm on suspicion; in the absence of state authority, policemen have no more right to "pat down" the outer clothing of passers-by, or of persons to whom they address casual questions, than does any other citizen. Consequently, the Ohio courts did not rest the constitutionality of this frisk upon any general authority in Officer McFadden to take reasonable steps to protect the citizenry, including himself, from dangerous weapons.

The state courts held, instead, that when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right, springing only from the necessity of the situation and not from any broader right to disarm, to frisk for his own protection. This holding, with which I agree and with which I think the Court agrees, offers the only satisfactory basis I can think of for affirming this conviction. The holding has, however, two logical corollaries that I do not think the Court has fully expressed.

In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person

addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

The facts of this case are illustrative of a proper stop and an incident frisk. Officer McFadden had no probable cause to arrest Terry for anything, but he had observed circumstances that would reasonably lead an experienced, prudent policeman to suspect that Terry was about to engage in burglary or robbery. His justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him, and Officer McFadden did so. When he did, he had no reason whatever to suppose that Terry might be armed, apart from the fact that he suspected him of planning a violent crime. McFadden asked Terry his name, to which Terry "mumbled something." Whereupon McFadden, without asking Terry to speak louder and without giving him any chance to explain his presence or his actions, forcibly frisked him.

I would affirm this conviction for what I believe to be the same reasons the Court relies on. I would, however, make explicit what I think is implicit in affirmance on

the present facts. Officer McFadden's right to interrupt Terry's freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime. Once that forced encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically.

Upon the foregoing premises, I join the opinion of the Court.

MR. JUSTICE WHITE, concurring.

I join the opinion of the Court, reserving judgment, however, on some of the Court's general remarks about the scope and purpose of the exclusionary rule which the Court has fashioned in the process of enforcing the Fourth Amendment.

Also, although the Court puts the matter aside in the context of this case, I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. In my view, it is temporary detention, warranted by the circumstances, which chiefly justifies the protective frisk for weapons. Perhaps the frisk itself, where proper, will have beneficial results whether questions are asked or not. If weapons are found, an arrest will fol-

low. If none are found, the frisk may nevertheless serve preventive ends because of its unmistakable message that suspicion has been aroused. But if the investigative stop is sustainable at all, constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process.

MR. JUSTICE DOUGLAS, dissenting.

I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a "search." But it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards, unless there was "probable cause" [1] to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

The opinion of the Court disclaims the existence of "probable cause." If loitering were in issue and that

[1] The meaning of "probable cause" has been developed in cases where an officer has reasonable grounds to believe that a crime has been or is being committed. See, *e. g.*, *The Thompson*, 3 Wall. 155; *Stacey* v. *Emery*, 97 U. S. 642; *Director General* v. *Kastenbaum*, 263 U. S. 25; *Carroll* v. *United States*, 267 U. S. 132; *United States* v. *Di Re*, 332 U. S. 581; *Brinegar* v. *United States*, 338 U. S. 160; *Draper* v. *United States*, 358 U. S. 307; *Henry* v. *United States*, 361 U. S. 98. In such cases, of course, the officer may make an "arrest" which results in charging the individual with commission of a crime. But while arresting persons who have already committed crimes is an important task of law enforcement, an equally if not more important function is crime prevention and deterrence of would-be criminals. "[T]here is no war between the Constitution and common sense," *Mapp* v. *Ohio*, 367 U. S. 643, 657. Police officers need not wait until they see a person actually commit a crime before they are able to "seize" that person. Respect for our constitutional system and personal liberty demands in return, however, that such a "seizure" be made only upon "probable cause."

was the offense charged, there would be "probable cause" shown. But the crime here is carrying concealed weapons; [2] and there is no basis for concluding that the officer had "probable cause" for believing that that crime was being committed. Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of "probable cause." We hold today that the police have greater authority to make a "seizure" and conduct a "search" than a judge has to authorize such action. We have said precisely the opposite over and over again.[3]

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[2] Ohio Rev. Code § 2923.01.

[3] This Court has always used the language of "probable cause" in determining the constitutionality of an arrest without a warrant. See, *e. g.*, *Carroll* v. *United States*, 267 U. S. 132, 156, 161–162; *Johnson* v. *United States*, 333 U. S. 10, 13–15; *McDonald* v. *United States*, 335 U. S. 451, 455–456; *Henry* v. *United States*, 361 U. S. 98; *Wong Sun* v. *United States*, 371 U. S. 471, 479–484. To give power to the police to seize a person on some grounds different from or less than "probable cause" would be handing them *more* authority than could be exercised by a magistrate in issuing a warrant to seize a person. As we stated in *Wong Sun* v. *United States*, 371 U. S. 471, with respect to requirements for arrests without warrants: "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." *Id.*, at 479. And we said in *Brinegar* v. *United States*, 338 U. S. 160, 176:

"These long-prevailing standards [for probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Re-

In other words, police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of *probable cause*. At the time of their "seizure" without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion." Moreover, the meaning of "probable cause" is deeply imbedded in our constitutional history. As we stated in *Henry* v. *United States*, 361 U. S. 98, 100–102:

> "The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required.
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> . . . . . .
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> "That philosophy [rebelling against these practices] later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant

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quiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

And see *Johnson* v. *United States*, 333 U. S. 10, 14–15; *Wrightson* v. *United States*, 95 U. S. App. D. C. 390, 393–394, 222 F. 2d 556, 559–560 (1955).

for arrest. And that principle has survived to this day. . . .

". . . It is important, we think, that this requirement [of probable cause] be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. . . . And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause. . . . This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen."

The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U. S. 160, 175.

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.

Until the Fourth Amendment, which is closely allied with the Fifth,[4] is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

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[4] See *Boyd* v. *United States*, 116 U. S. 616, 633:

"For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."

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SIBRON *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 63. Argued December 11–12, 1967.—Decided June 10, 1968.*

In No. 63, a New York police officer on patrol observed during an eight-hour period a man (appellant Sibron), whom he did not know and had no information about, in conversation with six or eight persons whom the officer knew as narcotics addicts. Later the officer saw Sibron in a restaurant with three more known addicts. The officer on none of these occasions overheard any conversation or saw anything pass between Sibron and the others. Later the officer ordered Sibron outside the restaurant, where the officer said, "You know what I am after." When Sibron reached into his pocket the officer reached into the same pocket and found some envelopes containing heroin. Sibron was charged with the unlawful possession of the heroin. The trial court rejected Sibron's motion to suppress the heroin as illegally seized, holding that the officer had probable cause to make the arrest and to seize the heroin. Thereafter Sibron pleaded guilty, preserving his right to appeal the evidentiary ruling. Sibron, who was precluded from obtaining bail pending appeal, completed service of his six-month sentence roughly two months before it was physically possible for him to present his case on appeal. His conviction was affirmed by the intermediate state appellate court and then by the New York Court of Appeals. In this Court the State initially sought to justify the search on the basis of New York's "stop-and-frisk" law, N. Y. Code Crim. Proc. § 180–a, which the New York Court of Appeals apparently viewed as authorizing the search. That law provides that a "police officer may stop any person abroad in a public place whom he reasonably suspects is committing . . ." certain crimes "and may demand . . . his name, address and an explanation of his actions," and when the officer "suspects that he is in danger . . . he may search such person for a dangerous weapon." After this Court noted probable jurisdiction the county District Attorney confessed error. In No. 74, an officer, at home in the apartment where he had lived for 12 years, heard a noise at the door. Through the peephole

*Together with No. 74, *Peters* v. *New York*, argued on December 12, 1967, also on appeal from the same court.

he saw two strangers (appellant Peters and another) tiptoeing furtively about the hallway. He called the police, dressed, and armed himself with his service revolver. He observed the two still engaged in suspicious maneuvers and, believing that they were attempting a burglary, the officer pursued them, catching Peters by the collar in the apartment hallway. Peters said that he had been visiting a girl friend, whom he declined to identify. The officer patted Peters down for weapons and discovered a hard object which he thought might be a knife but which turned out to be a container with burglar's tools, for the possession of which Peters was later charged. The trial court denied Peters' motion to suppress that evidence, refusing to credit Peters' testimony that he had been visiting a girl friend and finding that the officer had the requisite "reasonable suspicion" under § 180–a to stop and question Peters and to "frisk" him for a dangerous weapon in the apartment hallway, which the court found was a "public place," within the meaning of the statute. Peters then pleaded guilty, preserving his right to appeal the rejection of his motion to suppress. The intermediate appellate court affirmed, as did the New York Court of Appeals, which held the search justified under § 180–a. The parties on both sides contend that the principal issue in both cases is the constitutionality of § 180–a "on its face." *Held:*

1. Sibron's completion of service of his sentence does not moot his appeal. Pp. 50–58.

(a) A State may not effectively deny a convict access to its appellate courts until his release and then argue that his case has been mooted by his failure to do what it has prevented him from doing. P. 52.

(b) Even though Sibron was a multiple offender he "had a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick* v. *United States*, 329 U. S. 211 (1946), followed; *St. Pierre* v. *United States*, 319 U. S. 41 (1943), qualified. Pp. 55–58.

2. A confession of error, though entitled to great weight, does not relieve this Court from making its own examination of the record of a case where a conviction has been erroneously obtained, particularly where a judgment of the State's highest court interpreting a state statute is challenged on constitutional grounds and the confession of error has been made by a local official rather than by an official authorized to speak for the State as a whole. Pp. 58–59.

3. Since the question in this Court is not whether the search (or seizure) was authorized by § 180–a, but whether it was reasonable under the Fourth Amendment, the Court does not pass upon the facial constitutionality of the statute. Pp. 59–62.

4. In No. 63, the heroin was illegally seized and therefore inadmissible in evidence. Pp. 62–66.

(a) The search of Sibron cannot be justified as incident to a lawful arrest since no probable cause existed before the search. Pp. 62–63.

(b) There were no adequate grounds for the officer to search Sibron for weapons since the officer had no reason to believe that Sibron was armed and dangerous; and even if there arguably had been such a justification, there was no initial limited exploration for arms before the officer thrust his hand into Sibron's pocket. *Terry* v. *Ohio*, *ante*, p. 1, distinguished. Pp. 63–65.

5. In No. 74, the search was reasonable and the evidence seized was admissible. Pp. 66–67.

(a) The search of Peters was incident to a lawful arrest under the Fourth Amendment. Pp. 66–67.

(b) The "arrest" of Peters had taken place before the search, and after the arrest the officer had authority to search Peters. P. 67.

(c) The incident search, which was limited in scope, was justified by the need to seize weapons as well as the need to prevent destruction of evidence of the crime. P. 67.

No. 63, 18 N. Y. 2d 603, 219 N. E. 2d 196, reversed; No. 74, 18 N. Y. 2d 238, 219 N. E. 2d 595, affirmed.

Kalman Finkel and *Gretchen White Oberman* argued the cause and filed briefs for appellant in No. 63. *Robert Stuart Friedman* argued the cause and filed a brief for appellant in No. 74.

William I. Siegel argued the cause for appellee in No. 63. With him on the brief was *Aaron E. Koota*. *James J. Duggan* argued the cause for appellee in No. 74. With him on the briefs was *Leonard Rubenfeld*.

Michael Juviler argued the cause for the District Attorney of New York County, as *amicus curiae*, in

No. 63. With him on the brief filed in both cases were *Frank S. Hogan* and *H. Richard Uviller*. *Mr. Siegel* argued the cause for the District Attorney of Kings County, as *amicus curiae*, in No. 74.

Briefs of *amici curiae*, urging reversal in both cases, were filed by *Jack Greenberg*, *James M. Nabrit III*, *Michael Meltsner*, *Melvyn Zarr*, and *Anthony G. Amsterdam* for the NAACP Legal Defense and Educational Fund, Inc., and by *Bernard A. Berkman*, *Melvin L. Wulf*, and *Alan H. Levine* for the American Civil Liberties Union et al.

Louis J. Lefkowitz, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Maria L. Marcus* and *Brenda Soloff*, Assistant Attorneys General, filed a brief for the Attorney General of New York, as *amicus curiae*, urging affirmance in both cases.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These are companion cases to No. 67, *Terry* v. *Ohio*, *ante*, p. 1, decided today. They present related questions under the Fourth and Fourteenth Amendments, but the cases arise in the context of New York's "stop-and-frisk" law, N. Y. Code Crim. Proc. § 180–a. This statute provides:

> "1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the offenses specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.
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> "2. When a police officer has stopped a person for questioning pursuant to this section and reasonably

suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

The appellants, Sibron and Peters, were both convicted of crimes in New York state courts on the basis of evidence seized from their persons by police officers. The Court of Appeals of New York held that the evidence was properly admitted, on the ground that the searches which uncovered it were authorized by the statute. *People* v. *Sibron,* 18 N. Y. 2d 603, 219 N. E. 2d 196, 272 N. Y. S. 2d 374 (1966) (memorandum); *People* v. *Peters,* 18 N. Y. 2d 238, 219 N. E. 2d 595, 273 N. Y. S. 2d 217 (1966). Sibron and Peters have appealed their convictions to this Court, claiming that § 180-a is unconstitutional on its face and as construed and applied, because the searches and seizures which it was held to have authorized violated their rights under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp* v. *Ohio,* 367 U. S. 643 (1961). We noted probable jurisdiction, 386 U. S. 954 (1967); 386 U. S. 980 (1967), and consolidated the two cases for argument with No. 67.

The facts in these cases may be stated briefly. Sibron, the appellant in No. 63, was convicted of the unlawful possession of heroin.[1] He moved before trial to suppress

[1] N. Y. Pub. Health Law § 3305 makes the unauthorized possession of any narcotic drug unlawful, and §§ 1751 and 1751-a of the N. Y. Penal Law of 1909, then in effect, made the grade of the offense depend upon the amount of the drugs found in the possession of the defendant. The complaint in this case originally charged a felony, but the trial court granted the prosecutor's motion to reduce the

the heroin seized from his person by the arresting officer, Brooklyn Patrolman Anthony Martin. After the trial court denied his motion, Sibron pleaded guilty to the charge, preserving his right to appeal the evidentiary ruling.[2] At the hearing on the motion to suppress, Officer Martin testified that while he was patrolling his beat in uniform on March 9, 1965, he observed Sibron "continually from the hours of 4:00 P. M. to 12:00, midnight . . . in the vicinity of 742 Broadway." He stated that during this period of time he saw Sibron in conversation with six or eight persons whom he (Patrolman Martin) knew from past experience to be narcotics addicts. The officer testified that he did not overhear any of these conversations, and that he did not see anything pass between Sibron and any of the others. Late in the evening Sibron entered a restaurant. Patrolman Martin saw Sibron speak with three more known addicts inside the restaurant. Once again, nothing was overheard and nothing was seen to pass between Sibron and the addicts. Sibron sat down and ordered pie and coffee, and, as he was eating, Patrolman Martin approached him and told him to come outside. Once outside, the officer said to Sibron, "You know what I am after." According to the officer, Sibron "mumbled something and reached into his pocket." Simultaneously, Patrolman Martin thrust his hand into the same pocket, discovering several glassine envelopes, which, it turned out, contained heroin.

The State has had some difficulty in settling upon a

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charge on the ground that "the Laboratory report will indicate a misdemeanor charge." Sibron was convicted of a misdemeanor and sentenced to six months in jail.

[2] N. Y. Code Crim. Proc. § 813–c provides that an order denying a motion to suppress evidence in a criminal case "may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

theory for the admissibility of these envelopes of heroin. In his sworn complaint Patrolman Martin stated:

> "As the officer approached the defendant, the latter being in the direction of the officer and seeing him, he did put his hand in his left jacket pocket and pulled out a tinfoil envelope and did attempt to throw same to the ground. The officer never losing sight of the said envelope seized it from the def[endan]t's left hand, examined it and found it to contain ten glascine [*sic*] envelopes with a white substance alleged to be Heroin."

This version of the encounter, however, bears very little resemblance to Patrolman Martin's testimony at the hearing on the motion to suppress. In fact, he discarded the abandonment theory at the hearing.[3] Nor did the officer ever seriously suggest that he was in fear of bodily harm and that he searched Sibron in self-protection to find weapons.[4]

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[3] Patrolman Martin stated several times that he put his hand into Sibron's pocket and seized the heroin before Sibron had any opportunity to remove his own hand from the pocket. The trial court questioned him on this point:

"Q. Would you say at that time that he reached into his pocket and handed the packets to you? Is that what he did or did he drop the packets?

"A. He did not drop them. *I do not know what his intentions were.* He pushed his hand into his pocket.

"MR. JOSEPH [Prosecutor]: You intercepted it; didn't you, Officer?

"THE WITNESS: Yes." (Emphasis added.)

It is of course highly unlikely that Sibron, facing the officer at such close quarters, would have tried to remove the heroin from his pocket and throw it to the ground in the hope that he could escape responsibility for it.

[4] The possibility that Sibron, who never, so far as appears from the record, offered any resistance, might have posed a danger to

The prosecutor's theory at the hearing was that Patrolman Martin had probable cause to believe that Sibron was in possession of narcotics because he had seen him conversing with a number of known addicts over an eight-hour period. In the absence of any knowledge on Patrolman Martin's part concerning the nature of the intercourse between Sibron and the addicts, however, the trial court was inclined to grant the motion to suppress. As the judge stated, "All he knows about the unknown men: They are narcotics addicts. They might have been talking about the World Series. They might have been talking about prize fights." The prosecutor, however, reminded the judge that Sibron had admitted on the stand, in Patrolman Martin's absence, that he had been talking to the addicts about narcotics. Thereupon, the trial judge changed his mind and ruled that the officer had probable cause for an arrest.

Section 180–a, the "stop-and-frisk" statute, was not mentioned at any point in the trial court. The Appellate Term of the Supreme Court affirmed the conviction without opinion. In the Court of Appeals of New York, Sibron's case was consolidated with the *Peters* case, No. 74. The Court of Appeals held that the search in *Peters* was justified under the statute, but it wrote no opinion in Sibron's case. The dissents of Judges Fuld and Van Voorhis, however, indicate that the court rested its holding on § 180–a. At any rate, in its Brief in Oppo-

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Patrolman Martin's safety was never even discussed as a potential justification for the search. The only mention of weapons by the officer in his entire testimony came in response to a leading question by Sibron's counsel, when Martin stated that he "thought he [Sibron] might have been" reaching for a gun. Even so, Patrolman Martin did not accept this suggestion by the opposition regarding the reason for his action; the discussion continued upon the plain premise that he had been looking for narcotics all the time.

sition to the Jurisdictional Statement in this Court, the State sought to justify the search on the basis of the statute. After we noted probable jurisdiction, the District Attorney for Kings County confessed error.

Peters, the appellant in No. 74, was convicted of possessing burglary tools under circumstances evincing an intent to employ them in the commission of a crime.[5] The tools were seized from his person at the time of his arrest, and like Sibron he made a pretrial motion to suppress them. When the trial court denied the motion, he too pleaded guilty, preserving his right to appeal. Officer Samuel Lasky of the New York City Police Department testified at the hearing on the motion that he was at home in his apartment in Mount Vernon, New York, at about 1 p. m. on July 10, 1964. He had just finished taking a shower and was drying himself when he heard a noise at his door. His attempt to investigate was interrupted by a telephone call, but when he returned and looked through the peephole into the hall, Officer Lasky saw "two men tiptoeing out of the alcove toward the stairway." He immediately called the police, put on some civilian clothes and armed himself with his service revolver. Returning to the peephole, he saw "a tall man tiptoeing away from the alcove and followed by this shorter man, Mr. Peters, toward the stairway." Officer Lasky testified that he had lived in the 120-unit building for 12 years and that he did not recognize either of the men as tenants. Believing that he had happened upon the two men in the course of an attempted burglary,[6]

[5] N. Y. Pen. Law of 1909, § 408, made the possession of such tools under such circumstances a misdemeanor for first offenders and a felony for all those who have "been previously convicted of any crime." Peters was convicted of a felony under this section.

[6] Officer Lasky testified that when he called the police immediately before leaving his apartment, he "told the Sergeant at the desk that two burglars were on my floor."

Officer Lasky opened his door, entered the hallway and slammed the door loudly behind him. This precipitated a flight down the stairs on the part of the two men,[7] and Officer Lasky gave chase. His apartment was located on the sixth floor, and he apprehended Peters between the fourth and fifth floors. Grabbing Peters by the collar, he continued down another flight in unsuccessful pursuit of the other man. Peters explained his presence in the building to Officer Lasky by saying that he was visiting a girl friend. However, he declined to reveal the girl friend's name, on the ground that she was a married woman. Officer Lasky patted Peters down for weapons, and discovered a hard object in his pocket. He stated at the hearing that the object did not feel like a gun, but that it might have been a knife. He removed the object from Peters' pocket. It was an opaque plastic envelope, containing burglar's tools.

The trial court explicitly refused to credit Peters' testimony that he was merely in the building to visit his girl friend. It found that Officer Lasky had the requisite "reasonable suspicion" of Peters under § 180–a to stop him and question him. It also found that Peters' response was "clearly unsatisfactory," and that "under

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[7] Officer Lasky testified that when he emerged from his apartment, "I slammed the door, I had my gun and I ran down the stairs after them." A sworn affidavit of the Assistant District Attorney, which was before the trial court when it ruled on the motion to suppress, stated that when apprehended Peters was "fleeing down the steps of the building." The trial court explicitly took note of the flight of Peters and his companion as a factor contributing to Officer Lasky's "reasonable suspicion" of them:

"We think the testimony at the hearing does not require further laboring of this aspect of the matter, unless one is to believe that it is legitimately normal for a man to tip-toe about in the public hall of an apartment house while on a visit to his unidentified girl-friend, and, when observed by another tenant, to rapidly descend by stairway in the presence of elevators."

the circumstances Lasky's action in frisking Peters for a dangerous weapon was reasonable, even though Lasky was himself armed." It held that the hallway of the apartment building was a "public place" within the meaning of the statute. The Appellate Division of the Supreme Court affirmed without opinion. The Court of Appeals also affirmed, essentially adopting the reasoning of the trial judge, with Judges Fuld and Van Voorhis dissenting separately.

I.

At the outset we must deal with the question whether we have jurisdiction in No. 63. It is asserted that because Sibron has completed service of the six-month sentence imposed upon him as a result of his conviction, the case has become moot under *St. Pierre* v. *United States*, 319 U. S. 41 (1943).[8] We have concluded that the case is not moot.

[8] The first suggestion of mootness in this case came upon oral argument, when it was revealed for the first time that appellant had been released. This fact did not appear in the record, despite the fact that the release occurred well over two years before the case was argued here. Nor was mootness hinted at by the State in its Brief in Opposition to the Jurisdictional Statement in this Court—where it took the position that the decision below was so clearly right that it did not merit further review—or in its brief on the merits—in which it conceded that the decision below clearly violated Sibron's constitutional rights and urged that it was an aberrant interpretation which should not impair the constitutionality of the New York statute. Following the suggestion of mootness on oral argument, moreover, the State filed a brief in which it amplified its views as to why the case should be held moot, but added the extraordinary suggestion that this Court should ignore the problem and pronounce upon the constitutionality of a statute in a case which has become moot. Normally in these circumstances we would consider ourselves fully justified in foreclosing a party upon an issue; however, since the question goes to the very existence of a controversy for us to adjudicate, we have undertaken to review it.

In the first place, it is clear that the broad dictum with which the Court commenced its discussion in *St. Pierre*—that "the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate" (319 U. S., at 42)—fails to take account of significant qualifications recognized in *St. Pierre* and developed in later cases. Only a few days ago we held unanimously that the writ of habeas corpus was available to test the constitutionality of a state conviction where the petitioner had been in custody when he applied for the writ, but had been released before this Court could adjudicate his claims. *Carafas* v. *LaVallee*, 391 U. S. 234 (1968). On numerous occasions in the past this Court has proceeded to adjudicate the merits of criminal cases in which the sentence had been fully served or the probationary period during which a suspended sentence could be reimposed had terminated. *Ginsberg* v. *New York*, 390 U. S. 629 (1968); *Pollard* v. *United States*, 352 U. S. 354 (1957); *United States* v. *Morgan*, 346 U. S. 502 (1954); *Fiswick* v. *United States*, 329 U. S. 211 (1946). Thus mere release of the prisoner does not mechanically foreclose consideration of the merits by this Court.

St. Pierre itself recognized two possible exceptions to its "doctrine" of mootness, and both of them appear to us to be applicable here. The Court stated that "[i]t does not appear that petitioner could not have brought his case to this Court for review before the expiration of his sentence," noting also that because the petitioner's conviction was for contempt and because his controversy with the Government was a continuing one, there was a good chance that there would be "ample opportunity to review" the important question presented on the merits in a future proceeding. 319 U. S., at 43. This

was a plain recognition of the vital importance of keeping open avenues of judicial review of deprivations of constitutional right.[9] There was no way for Sibron to bring his case here before his six-month sentence expired. By statute he was precluded from obtaining bail pending appeal,[10] and by virtue of the inevitable delays of the New York court system, he was released less than a month after his newly appointed appellate counsel had been supplied with a copy of the transcript and roughly two months before it was physically possible to present his case to the first tier in the state appellate court system.[11] This was true despite the fact that he took all steps to perfect his appeal in a prompt, diligent, and timely manner.

Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for "minor" offenses which carry only short sentences.[12] We do not believe that the Constitution contemplates that

[9] Cf. *Fay* v. *Noia*, 372 U. S. 391, 424 (1963):
"[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."

[10] See N. Y. Code Crim. Proc. § 555 subd. 2.

[11] Sibron was arrested on March 9, 1965, and was unable to make bail before trial because of his indigency. He thus remained in jail from that time until the expiration of his sentence (with good time credit) on July 10, 1965. He was convicted on April 23. His application for leave to proceed *in forma pauperis* was not granted until May 14, and his assigned appellate counsel was not provided with a transcript until June 11. The Appellate Term of the Supreme Court recessed on June 7 until September. Thus Sibron was released well before there had been any opportunity even to argue his case in the intermediate state appellate court. A decision by the Court of Appeals of New York was not had until July 10, 1966, the anniversary of Sibron's release.

[12] Cf., *e. g.*, *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960).

people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. A State may not cut off federal review of whole classes of such cases by the simple expedient of a blanket denial of bail pending appeal. As *St. Pierre* clearly recognized, a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing.[13]

The second exception recognized in *St. Pierre* permits adjudication of the merits of a criminal case where "under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which

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[13] In *St. Pierre* the Court noted that the petitioner could have taken steps to preserve his case, but that "he did not apply to this Court for a stay or a supersedeas." 319 U. S., at 43. Here however, it is abundantly clear that there is no procedure of which Sibron could have availed himself to prevent the expiration of his sentence long before this Court could hear his case. A supersedeas from this Court is a purely ancillary writ, and may issue only in connection with an appeal actually taken. *Ex parte Ralston,* 119 U. S. 613 (1887); Sup. Ct. Rule 18; see R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 435, at 883 (R. Wolfson & P. Kurland ed., 1951). At the time Sibron completed service of his sentence, the only judgment outstanding was the conviction itself, rendered by the Criminal Court of the City of New York, County of Kings. This Court had no jurisdiction to hear an appeal from that judgment, since it was not rendered by the "highest court of a State in which a decision could be had," 28 U. S. C. § 1257, and there could be no warrant for interference with the orderly appellate processes of the state courts. Thus no supersedeas could have issued. Nor could this Court have ordered Sibron admitted to bail before the expiration of his sentence, since the offense was not bailable, 18 U. S. C. § 3144; see n. 10, *supra.* Thus this case is distinguishable from *St. Pierre* in that Sibron "could not have brought his case to this Court for review before the expiration of his sentence." 319 U. S., at 43.

has . . . been satisfied." 319 U. S., at 43. Subsequent cases have expanded this exception to the point where it may realistically be said that inroads have been made upon the principle itself. *St. Pierre* implied that the burden was upon the convict to show the existence of collateral legal consequences. Three years later in *Fiswick* v. *United States*, 329 U. S. 211 (1946), however, the Court held that a criminal case had not become moot upon release of the prisoner, noting that the convict, an alien, might be subject to deportation for having committed a crime of "moral turpitude"—even though it had never been held (and the Court refused to hold) that the crime of which he was convicted fell into this category. The Court also pointed to the fact that if the petitioner should in the future decide he wanted to become an American citizen, he might have difficulty proving that he was of "good moral character." *Id.*, at 222.[14]

The next case which dealt with the problem of collateral consequences was *United States* v. *Morgan*, 346 U. S. 502 (1954). There the convict had probably been subjected to a higher sentence as a recidivist by a state court on account of the old federal conviction which he sought to attack. But as the dissent pointed out, there was no indication that the recidivist increment would be removed from his state sentence upon invalidation of the federal conviction, *id.*, at 516, n. 4, and the Court chose to rest its holding that the case was not moot upon

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[14] Compare *Ginsberg* v. *New York*, 390 U. S. 629, 633, n. 2 (1968), where this Court held that the mere possibility that the Commissioner of Buildings of the Town of Hempstead, New York, might "in his discretion" attempt in the future to revoke a license to run a luncheonette because of a single conviction for selling relatively inoffensive "girlie" magazines to a 16-year-old boy was sufficient to preserve a criminal case from mootness.

a broader view of the matter. Without canvassing the possible disabilities which might be imposed upon Morgan or alluding specifically to the recidivist sentence, the Court stated:

> "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid." *Id.*, at 512–513.

Three years later, in *Pollard* v. *United States*, 352 U. S. 354 (1957), the Court abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed. With nothing more than citations to *Morgan* and *Fiswick*, and a statement that "convictions may entail collateral legal disadvantages in the future," *id.*, at 358, the Court concluded that "[t]he possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." *Ibid.* The Court thus acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.[15] The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness." *Parker* v. *Ellis*, 362 U. S. 574, 577 (1960) (dissenting opinion).

This case certainly meets that test for survival. Without pausing to canvass the possibilities in detail, we note that New York expressly provides by statute that Sibron's conviction may be used to impeach his character should he choose to put it in issue at any future

[15] See generally Note, 53 Va. L. Rev. 403 (1967).

criminal trial, N. Y. Code Crim. Proc. § 393–c, and that it must be submitted to a trial judge for his consideration in sentencing should Sibron again be convicted of a crime, N. Y. Code Crim. Proc. § 482. There are doubtless other collateral consequences. Moreover, we see no relevance in the fact that Sibron is a multiple offender. Morgan was a multiple offender, see 346 U. S. at 503–504, and so was Pollard, see 352 U. S., at 355–357. A judge or jury faced with a question of character, like a sentencing judge, may be inclined to forgive or at least discount a limited number of minor transgressions, particularly if they occurred at some time in the relatively distant past.[16] It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable.[17] And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated. We cannot foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record. The question of the validity of a criminal conviction can arise in many contexts, compare *Burgett* v. *Texas*, 389 U. S. 109 (1967), and the sooner the issue is fully litigated the better for all concerned. It is always preferable to litigate a matter

[16] We do not know from the record how many convictions Sibron had, for what crimes, or when they were rendered. At the hearing he admitted to a 1955 conviction for burglary and a 1957 misdemeanor conviction for possession of narcotics. He also admitted that he had other convictions, but none were specifically alluded to.

[17] We note that there is a clear distinction between a general impairment of credibility, to which the Court referred in *St. Pierre*, see 319 U. S., at 43, and New York's specific statutory authorization for use of the conviction to impeach the "character" of a defendant in a criminal proceeding. The latter is a clear legal disability deliberately and specifically imposed by the legislature.

when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. Moreover, litigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade. And it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action. Cf. *Peyton* v. *Rowe*, 391 U. S. 54, 64 (1968).[18]

None of the concededly imperative policies behind the constitutional rule against entertaining moot controversies would be served by a dismissal in this case. There is nothing abstract, feigned, or hypothetical about Sibron's appeal. Nor is there any suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation. We have before us a fully developed record of testimony about contested historical facts, which reflects the "impact of actuality" [19] to a far greater degree than many controversies accepted for adjudication as a matter of course under the Federal Declaratory Judgment Act, 28 U. S. C. § 2201.

St. Pierre v. *United States*, *supra*, must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. That certainly is not

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[18] This factor has clearly been considered relevant by the Court in the past in determining the issue of mootness. See *Fiswick* v. *United States*, 329 U. S. 211, 221–222 (1946).

[19] Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1006 (1924). See also *Parker* v. *Ellis*, 362 U. S. 574, 592–593 (1960) (dissenting opinion).

the case here. Sibron "has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick* v. *United States, supra,* at 222. The case is not moot.

II.

We deal next with the confession of error by the District Attorney for Kings County in No. 63. Confessions of error are, of course, entitled to and given great weight, but they do not "relieve this Court of the performance of the judicial function." *Young* v. *United States,* 315 U. S. 257, 258 (1942). It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained. For one thing, as we noted in *Young,* "our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties." 315 U. S., at 259. See also *Marino* v. *Ragen,* 332 U. S. 561 (1947). This consideration is entitled to special weight where, as in this case, we deal with a judgment of a State's highest court interpreting a state statute which is challenged on constitutional grounds. The need for such authoritative declarations of state law in sensitive constitutional contexts has been the very reason for the development of the abstention doctrine by this Court. See, *e. g., Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496 (1941). Such a judgment is the final product of a sovereign judicial system, and is deserving of respectful treatment by this Court. Moreover, in this case the confession of error on behalf of the entire state executive and judicial branches is made, not by a state official, but by the elected legal officer of one political subdivision within the State. The District Attorney for Kings County seems to have come late to the opinion that this conviction violated Sibron's constitutional

rights. For us to accept his view blindly in the circumstances, when a majority of the Court of Appeals of New York has expressed the contrary view, would be a disservice to the State of New York and an abdication of our obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits them to conform their future behavior to the demands of the Constitution. We turn to the merits.

III.

The parties on both sides of these two cases have urged that the principal issue before us is the constitutionality of § 180–a "on its face." We decline, however, to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of § 180–a next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible. The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case. In this respect it is quite different from the question of the adequacy of the procedural safeguards written into a statute which purports to authorize the issuance of search warrants in certain circumstances. See *Berger* v. *New York*, 388 U. S. 41 (1967). No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope, which lies at the heart of the Fourth Amendment. *E. g., Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Giordenello* v. *United States*, 357 U. S. 480 (1958). This Court held last Term in *Berger* v. *New York, supra*, that N. Y. Code Crim Proc. § 813–a, which established a procedure for the issuance of search warrants to permit electronic eavesdropping, failed to

embody the safeguards demanded by the Fourth and Fourteenth Amendments.

Section 180–a, unlike § 813–a, deals with the substantive validity of certain types of seizures and searches without warrants. It purports to authorize police officers to "stop" people, "demand" explanations of them and "search [them] for dangerous weapon[s]" in certain circumstances upon "reasonable suspicion" that they are engaged in criminal activity and that they represent a danger to the policeman. The operative categories of § 180–a are not the categories of the Fourth Amendment, and they are susceptible of a wide variety of interpretations.[20] New York is, of course, free to develop its own

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[20] It is not apparent, for example, whether the power to "stop" granted by the statute entails a power to "detain" for investigation or interrogation upon less than probable cause, or if so what sort of durational limitations upon such detention are contemplated. And while the statute's apparent grant of a power of compulsion indicates that many "stops" will constitute "seizures," it is not clear that all conduct analyzed under the rubric of the statute will either rise to the level of a "seizure" or be based upon less than probable cause. In No. 74, the *Peters* case, for example, the New York courts justified the seizure of appellant under § 180–a, but we have concluded that there was in fact probable cause for an arrest when Officer Lasky seized Peters on the stairway. See *infra*, at 66. In any event, a pronouncement by this Court upon the abstract validity of § 180–a's "stop" category would be most inappropriate in these cases, since we have concluded that neither of them presents the question of the validity of a seizure of the person for purposes of interrogation upon less than probable cause.

The statute's other categories are equally elastic, and it was passed too recently for the State's highest court to have ruled upon many of the questions involving potential intersections with federal constitutional guarantees. We cannot tell, for example, whether the officer's power to "demand" of a person an "explanation of his actions" contemplates either an obligation on the part of the citizen to answer or some additional power on the part of the officer in the event of a refusal to answer, or even whether the interrogation following the "stop" is "custodial." Compare *Miranda* v. *Arizona*, 384 U. S.

law of search and seizure to meet the needs of local law enforcement, see *Ker* v. *California*, 374 U. S. 23, 34 (1963), and in the process it may call the standards it employs by any names it may choose. It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure "is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one." *Cooper* v. *California*, 386 U. S. 58, 61 (1967).

Accordingly, we make no pronouncement on the facial constitutionality of § 180–a. The constitutional point

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436 (1966). There are, moreover, substantial indications that the statutory category of a "search for a dangerous weapon" may encompass conduct considerably broader in scope than that which we approved in *Terry* v. *Ohio*, *ante*, p. 1. See *infra*, at 65–66. See also *People* v. *Taggart*, 20 N. Y. 2d 335, 229 N. E. 2d 581, 283 N. Y. S. 2d 1 (1967). At least some of the activity apparently permitted under the rubric of searching for dangerous weapons may thus be permissible under the Constitution only if the "reasonable suspicion" of criminal activity rises to the level of probable cause. Finally, it is impossible to tell whether the standard of "reasonable suspicion" connotes the same sort of specificity, reliability, and objectivity which is the touchstone of permissible governmental action under the Fourth Amendment. Compare *Terry* v. *Ohio*, *supra*, with *People* v. *Taggart*, *supra*. In this connection we note that the searches and seizures in both *Sibron* and *Peters* were upheld by the Court of Appeals of New York as predicated upon "reasonable suspicion," whereas we have concluded that the officer in *Peters* had probable cause for an arrest, while the policeman in *Sibron* was not possessed of any information which would justify an intrusion upon rights protected by the Fourth Amendment.

with respect to a statute of this peculiar sort, as the Court of Appeals of New York recognized, is "not so much . . . the language employed as . . . the conduct it authorizes." *People* v. *Peters,* 18 N. Y. 2d 238, 245, 219 N. E. 2d 595, 599, 273 N. Y. S. 2d 217, 222 (1966). We have held today in *Terry* v. *Ohio, ante,* p. 1, that police conduct of the sort with which § 180–a deals must be judged under the Reasonable Search and Seizure Clause of the Fourth Amendment. The inquiry under that clause may differ sharply from the inquiry set up by the categories of § 180–a. Our constitutional inquiry would not be furthered here by an attempt to pronounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the searches and seizures which underlie these two convictions.

IV.

Turning to the facts of Sibron's case, it is clear that the heroin was inadmissible in evidence against him. The prosecution has quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime at the time Patrolman Martin accosted him in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized that Patrolman Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts. So far as he knew, they might indeed "have been talking about the World Series." The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed

until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. *E. g., Henry* v. *United States,* 361 U. S. 98 (1959); *Johnson* v. *United States,* 333 U. S. 10, 16–17 (1948). Thus the search cannot be justified as incident to a lawful arrest.

If Patrolman Martin lacked probable cause for an arrest, however, his seizure and search of Sibron might still have been justified at the outset if he had reasonable grounds to believe that Sibron was armed and dangerous. *Terry* v. *Ohio, ante,* p. 1. We are not called upon to decide in this case whether there was a "seizure" of Sibron inside the restaurant antecedent to the physical seizure which accompanied the search. The record is unclear with respect to what transpired between Sibron and the officer inside the restaurant. It is totally barren of any indication whether Sibron accompanied Patrolman Martin outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation. In any event, this deficiency in the record is immaterial, since Patrolman Martin obtained no new information in the interval between his initiation of the encounter in the restaurant and his physical seizure and search of Sibron outside.

Although the Court of Appeals of New York wrote no opinion in this case, it seems to have viewed the search here as a self-protective search for weapons and to have affirmed on the basis of § 180–a, which authorizes such a search when the officer "reasonably suspects that he is in danger of life or limb." The Court of Appeals has, at any rate, justified searches during field interrogation on the ground that "[t]he answer to the question propounded by the policeman may be a

bullet; in any case the exposure to danger could be very great." *People* v. *Rivera*, 14 N. Y. 2d 441, 446, 201 N. E. 2d 32, 35, 252 N. Y. S. 2d 458, 463 (1964), cert. denied, 379 U. S. 978 (1965). But the application of this reasoning to the facts of this case proves too much. The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. *Terry* v. *Ohio, supra.* Patrolman Martin's testimony reveals no such facts. The suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime. Nor did Patrolman Martin urge that when Sibron put his hand in his pocket, he feared that he was going for a weapon and acted in self-defense. His opening statement to Sibron—"You know what I am after"—made it abundantly clear that he sought narcotics, and his testimony at the hearing left no doubt that he thought there were narcotics in Sibron's pocket.[21]

[21] It is argued in dissent that this Court has in effect overturned factual findings by the two courts below that the search in this case was a self-protective measure on the part of Patrolman Martin, who thought that Sibron might have been reaching for a gun. It is true, as we have noted, that the Court of Appeals of New York apparently rested its approval of the search on this view. The trial court, however, made no such finding of fact. The trial judge adopted the theory of the prosecution at the hearing on the motion to suppress. This theory was that there was probable cause to arrest Sibron for some crime having to do with narcotics. The fact

Even assuming *arguendo* that there were adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth

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which tipped the scales for the trial court had nothing to do with danger to the policeman. The judge expressly changed his original view and held the heroin admissible upon being reminded that Sibron had admitted on the stand that he spoke to the addicts about narcotics. This admission was not relevant on the issue of probable cause, and we do not understand the dissent to take the position that prior to the discovery of heroin, there was probable cause for an arrest.

Moreover, Patrolman Martin himself never at any time put forth the notion that he acted to protect himself. As we have noted, this subject never came up, until on re-direct examination defense counsel raised the question whether Patrolman Martin thought Sibron was going for a gun. See n. 4, *supra*. This was the only reference to weapons at any point in the hearing, and the subject was swiftly dropped. In the circumstances an unarticulated "finding" by an appellate court which wrote no opinion, apparently to the effect that the officer's invasion of Sibron's person comported with the Constitution because of the need to protect himself, is not deserving of controlling deference.

Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

V.

We think it is equally clear that the search in Peters' case was wholly reasonable under the Constitution. The Court of Appeals of New York held that the search was made legal by § 180–a, since Peters was "abroad in a public place," and since Officer Lasky was reasonably suspicious of his activities and, once he had stopped Peters, reasonably suspected that he was in danger of life or limb, even though he held Peters at gun point. This may be the justification for the search under state law. We think, however, that for purposes of the Fourth Amendment the search was properly incident to a lawful arrest. By the time Officer Lasky caught up with Peters on the stairway between the fourth and fifth floors of the apartment building, he had probable cause to arrest him for attempted burglary. The officer heard strange noises at his door which apparently led him to believe that someone sought to force entry. When he investigated these noises he saw two men, whom he had never seen before in his 12 years in the building, tiptoeing furtively about the hallway. They were still engaged in these maneuvers after he called the police and dressed hurriedly. And when Officer Lasky entered the hallway, the men fled down the stairs. It is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity. As the trial court explicitly recognized,[22] deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors

[22] See n. 7, *supra*.

to be considered in the decision to make an arrest. *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Husty* v. *United States*, 282 U. S. 694 (1931); see *Henry* v. *United States*, 361 U. S. 98, 103 (1959).

As we noted in Sibron's case, a search incident to a lawful arrest may not precede the arrest and serve as part of its justification. It is a question of fact precisely when, in each case, the arrest took place. *Rios* v. *United States*, 364 U. S. 253, 261–262 (1960). And while there was some inconclusive discussion in the trial court concerning when Officer Lasky "arrested" Peters, it is clear that the arrest had, for purposes of constitutional justification, already taken place before the search commenced. When the policeman grabbed Peters by the collar, he abruptly "seized" him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity. See *Henry* v. *United States*, *supra*, at 103. At that point he had the authority to search Peters, and the incident search was obviously justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime." *Preston* v. *United States*, 376 U. S. 364, 367 (1964). Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons. While patting down his outer clothing, Officer Lasky discovered an object in his pocket which might have been used as a weapon. He seized it and discovered it to be a potential instrument of the crime of burglary.

We have concluded that Peters' conviction fully comports with the commands of the Fourth and Fourteenth Amendments, and must be affirmed. The conviction in

No. 63, however, must be reversed, on the ground that the heroin was unconstitutionally admitted in evidence against the appellant.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring in No. 63.

Officer Martin testified that on the night in question he observed appellant Sibron continually from 4 p. m. to 12 midnight and that during that eight-hour period, Sibron conversed with different persons each personally known to Martin as narcotics addicts. When Sibron entered a restaurant, Martin followed him inside where he observed Sibron talking to three other persons also personally known to Martin as narcotics addicts. At that point he approached Sibron and asked him to come outside. When Sibron stepped out, Martin said, "You know what I am after." Sibron then reached inside his pocket, and at the same time Martin reached into the same pocket and discovered several glassine envelopes which were found to contain heroin. Sibron was subsequently convicted of unlawful possession of heroin.

Consorting with criminals may in a particular factual setting be a basis for believing that a criminal project is underway. Yet talking with addicts without more rises no higher than suspicion. That is all we have here; and if it is sufficient for a "seizure" and a "search," then there is no such thing as privacy for this vast group of "sick" people.

MR. JUSTICE DOUGLAS, concurring in No. 74.

Officer Lasky testified that he resided in a multiple-dwelling apartment house in Mount Vernon, New York. His apartment was on the sixth floor. At about 1 in the afternoon, he had just stepped out of the shower and was drying himself when he heard a noise at his door. Just then his phone rang and he answered the call.

After hanging up, he looked through the peephole of his door and saw two men, one of whom was appellant, tiptoeing out of an alcove toward the stairway. He phoned his headquarters to report this occurrence, and then put on some clothes and proceeded back to the door. This time he saw a tall man tiptoeing away from the alcove, followed by appellant, toward the stairway. Lasky came out of his apartment, slammed the door behind him, and then gave chase, gun in hand, as the two men began to run down the stairs. He apprehended appellant on the stairway between the fourth and fifth floors, and asked what he was doing in the building. Appellant replied that he was looking for a girl friend, but refused to give her name, saying that she was a married woman. Lasky then "frisked" appellant for a weapon, and discovered in his right pants pocket a plastic envelope. The envelope contained a tension bar, 6 picks and 2 Allen wrenches with the short leg filed down to a screwdriver edge. Appellant was subsequently convicted for possession of burglary tools.

I would hold that at the time Lasky seized appellant, he had probable cause to believe that appellant was on some kind of burglary or housebreaking mission.* In my view he had probable cause to seize appellant and accordingly to conduct a limited search of his person for weapons.

MR. JUSTICE WHITE, concurring.

I join Parts I–IV of the Court's opinion. With respect to appellant Peters, I join the affirmance of his conviction, not because there was probable cause to arrest, a question I do not reach, but because there was probable cause to stop Peters for questioning and thus to frisk him for dangerous weapons. See my concurring

*See N. Y. Pen. Code §§ 140.20, 140.25 (1967).

opinion in *Terry* v. *Ohio*, *ante*, p. 34. While patting down Peters' clothing the officer "discovered an object in his pocket which might have been used as a weapon." *Ante*, at 67. That object turned out to be a package of burglar's tools. In my view those tools were properly admitted into evidence.

MR. JUSTICE FORTAS, concurring.

1. I would construe *St. Pierre* v. *United States*, 319 U. S. 41 (1943), in light of later cases, to mean that a criminal case is moot *if it appears* that no collateral legal consequences will be imposed on the basis of the challenged conviction. (Cf. majority opinion, *ante*, at 57–58.)

2. I join without qualification in the Court's judgment and opinion concerning the standards to be used in determining whether § 180–a as applied to particular situations is constitutional. But I would explicitly reserve the possibility that a statute purporting to authorize a warrantless search might be so extreme as to justify our concluding that it is unconstitutional "on its face," regardless of the facts of the particular case. To the extent that the Court's opinion may indicate the contrary, I disagree. (Cf. majority opinion, *ante*, at 59–62.)

3. In Sibron's case (No. 63), I would conclude that we find nothing in the record of this case or pertinent principles of law to cause us to disregard the confession of error by counsel for Kings County. I would not discourage confessions of error nor would I disregard them. (Cf. majority opinion, pt. II, *ante*, at 58–59.)

MR. JUSTICE HARLAN, concurring in the result.

I fully agree with the results the Court has reached in these cases. They are, I think, consonant with and dictated by the decision in *Terry* v. *Ohio*, *ante*, p. 1. For reasons I do not understand, however, the Court has declined to rest the judgments here upon the principles

of *Terry*. In doing so it has, in at least one particular, made serious inroads upon the protection afforded by the Fourth and Fourteenth Amendments.

The Court is of course entirely correct in concluding that we should not pass upon the constitutionality of the New York stop-and-frisk law "on its face." The statute is certainly not unconstitutional on its face: that is, it does not plainly purport to authorize unconstitutional activities by policemen. Nor is it "constitutional on its face" if that expression means that any action now or later thought to fall within the terms of the statute is, *ipso facto*, within constitutional limits as well. No statute, state or federal, receives any such *imprimatur* from this Court.

This does not mean, however, that the statute should be ignored here. The State of New York has made a deliberate effort to deal with the complex problem of on-the-street policework. Without giving *carte blanche* to any particular verbal formulation, we should, I think, where relevant, indicate the extent to which that effort has been constitutionally successful. The core of the New York statute is the permission to stop any person reasonably suspected of crime. Under the decision in *Terry* a right to stop may indeed be premised on reasonable suspicion and does not require probable cause, and hence the New York formulation is to that extent constitutional. This does not mean that suspicion need not be "reasonable" in the constitutional as well as the statutory sense. Nor does it mean that this Court has approved more than a momentary stop or has indicated what questioning may constitutionally occur during a stop, for the cases before us do not raise these questions.[1]

[1] For a thoughtful study of many of these points, see ALI Model Code of Pre-Arraignment Procedure, Tentative Draft No. 1, §§ 2.01, 2.02, and the commentary on these sections appearing at 87–105.

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Turning to the individual cases, I agree that the conviction in No. 63, *Sibron*, should be reversed, and would do so upon the premises of *Terry*. At the outset, I agree that sufficient collateral legal consequences of Sibron's conviction have been shown to prevent this case from being moot, and I agree that the case should not be reversed simply on the State's confession of error.

The considerable confusion that has surrounded the "search" or "frisk" of Sibron that led to the actual recovery of the heroin seems to me irrelevant for our purposes. Officer Martin repudiated his first statement, which might conceivably have indicated a theory of "abandonment," see *ante*, at 45–46. No matter which of the other theories is adopted, it is clear that there was at least a forcible frisk, comparable to that which occurred in *Terry*, which requires constitutional justification.

Since carrying heroin is a crime in New York, probable cause to believe Sibron was carrying heroin would also have been probable cause to arrest him. As the Court says, Officer Martin clearly had neither. Although Sibron had had conversations with several known addicts, he had done nothing, during the several hours he was under surveillance, that made it "probable" that he was either carrying heroin himself or engaging in transactions with these acquaintances.

Nor were there here reasonable grounds for a *Terry*-type "stop" short of an arrest. I would accept, as an adequate general formula, the New York requirement that the officer must "reasonably suspect" that the person he stops "is committing, has committed or is about to commit a felony." N. Y. Code Crim. Proc. § 180–a. "On its face," this requirement is, if anything, more stringent than the requirement stated by the Court in *Terry:* "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . ."

Ante, at 30. The interpretation of the New York statute is of course a matter for the New York courts, but any particular stop must meet the *Terry* standard as well.

The forcible encounter between Officer Martin and Sibron did not meet the *Terry* reasonableness standard. In the first place, although association with known criminals may, I think, properly be a factor contributing to the suspiciousness of circumstances, it does not, entirely by itself, create suspicion adequate to support a stop. There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended. That was the case in *Terry*, but it palpably was not the case here. For eight continuous hours, up to the point when he interrupted Sibron eating a piece of pie, Officer Martin apparently observed not a single suspicious action and heard not a single suspicious word on the part of Sibron himself or any person with whom he associated. If anything, that period of surveillance pointed away from suspicion.

Furthermore, in *Terry*, the police officer judged that his suspect was about to commit a violent crime and that he had to assert himself in order to prevent it. Here there was no reason for Officer Martin to think that an incipient crime, or flight, or the destruction of evidence would occur if he stayed his hand; indeed, there was no more reason for him to intrude upon Sibron at the moment when he did than there had been four hours earlier, and no reason to think the situation would have changed four hours later. While no hard-and-fast rule can be drawn, I would suggest that one important factor, missing here, that should be taken into account in determining whether there are reasonable grounds for a forcible intrusion is whether there is any need for immediate action.

For these reasons I would hold that Officer Martin lacked reasonable grounds to intrude forcibly upon Sibron. In consequence, the essential premise for the right to conduct a self-protective frisk was lacking. See my concurring opinion in *Terry, ante,* p. 31. I therefore find it unnecessary to reach two further troublesome questions. First, although I think that, as in *Terry,* the right to frisk is automatic when an officer lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed, it is not clear that suspected possession of narcotics falls into this category. If the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so. Second, I agree with the Court that even where a self-protective frisk is proper, its scope should be limited to what is adequate for its purposes. I see no need here to resolve the question whether this frisk exceeded those bounds.

Turning now to No. 74, *Peters,* I agree that the conviction should be upheld, but here I would differ strongly and fundamentally with the Court's approach. The Court holds that the burglar's tools were recovered from Peters in a search incident to a lawful arrest. I do not think that Officer Lasky had anything close to probable cause to arrest Peters before he recovered the burglar's tools. Indeed, if probable cause existed here, I find it difficult to see why a different rationale was necessary to support the stop and frisk in *Terry* and why States such as New York have had to devote so much thought to the constitutional problems of field interrogation. This case will be the latest in an exceedingly small number of cases in this Court indicating what suffices for probable cause. While, as the Court noted in *Terry,* the influence of this Court on police tactics "in

the field" is necessarily limited, the influence of a decision here on hundreds of courts and magistrates who have to decide whether there is probable cause for a real arrest or a full search will be large.

Officer Lasky testified that at 1 o'clock in the afternoon he heard a noise at the door to his apartment. He did not testify, nor did any state court conclude, that this "led him to believe that someone sought to force entry." *Ante*, at 66. He looked out into the public hallway and saw two men whom he did not recognize, surely not a strange occurrence in a large apartment building. One of them appeared to be tip-toeing. Lasky did not testify that the other man was tip-toeing or that either of them was behaving "furtively." *Ibid.* Lasky left his apartment and ran to them, gun in hand. He did not testify that there was any "flight," *ante*, at 66,[2] though flight at the approach of a gun-carrying stranger (Lasky was apparently not in uniform) is hardly indicative of *mens rea*.

Probable cause to arrest means evidence that would warrant a prudent and reasonable man (such as a magistrate, actual or hypothetical) in believing that a particular person has committed or is committing a crime.[3]

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[2] It is true, as the Court states, that the New York courts attributed such a statement to him. The attribution seems to me unwarranted by the record.

[3] *E. g., Beck* v. *Ohio*, 379 U. S. 89; *Rios* v. *United States*, 364 U. S. 253; *Henry* v. *United States*, 361 U. S. 98. In *Henry, supra*, at 100, the Court said that 18 U. S. C. § 3052 "states the constitutional standard" for felony arrests by FBI agents without warrant. That section authorized agents to "make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." Under *Ker* v. *California*, 374 U. S. 23, a parallel standard is applicable to warrantless arrests by state and local police.

Officer Lasky had no extrinsic reason to think that a crime had been or was being committed, so whether it would have been proper to issue a warrant depends entirely on his statements of his observations of the men. Apart from his conclusory statement that he thought the men were burglars, he offered very little specific evidence. I find it hard to believe that if Peters had made good his escape and there were no report of a burglary in the neighborhood, this Court would hold it proper for a prudent neutral magistrate to issue a warrant for his arrest.[4]

In the course of upholding Peters' conviction, the Court makes two other points that may lead to future confusion. The first concerns the "moment of arrest." If there is an escalating encounter between a policeman and a citizen, beginning perhaps with a friendly conversation but ending in imprisonment, and if evidence is developing during that encounter, it may be important to identify the moment of arrest, *i. e.*, the moment when the policeman was not permitted to proceed further unless he by then had probable cause. This moment-of-arrest problem is not, on the Court's premises, in any way involved in this case: the Court holds that Officer Lasky had probable cause to arrest at the moment he caught Peters, and hence probable cause clearly preceded anything that might be thought an arrest. The Court implies, however, that although there is no problem about whether the arrest of Peters occurred

[4] Compare *Henry* v. *United States*, 361 U. S. 98, in which the Court said there was "far from enough evidence . . . to justify a magistrate in issuing a warrant." *Id.*, at 103. Agents knew that a federal crime, theft of whisky from an interstate shipment, had been committed "in the neighborhood." Petitioner was observed driving into an alley, picking up packages, and driving away. I agree that these facts did not constitute probable cause, but find it hard to see that the evidence here was more impressive.

late enough, *i. e.*, after probable cause developed, there might be a problem about whether it occurred *early* enough, *i. e.*, before Peters was searched. This seems to me a false problem. Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

This fact is important because, as demonstrated by *Terry*, not every curtailment of freedom of movement is an "arrest" requiring antecedent probable cause. At the same time, an officer who does have probable cause may of course seize and search immediately. Hence while certain police actions will undoubtedly turn an encounter into an arrest requiring antecedent probable cause, the prosecution must be able to date the arrest as *early* as it chooses following the development of probable cause.

The second possible source of confusion is the Court's statement that "Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects." *Ante*, at 67. Since the Court found probable cause to arrest Peters, and since an officer arresting on probable cause is entitled to make a very full incident search,[5] I assume that this is merely a factual observation. As a factual matter, I agree with it.

Although the articulable circumstances are somewhat less suspicious here than they were in *Terry*, I would affirm on the *Terry* ground that Officer Lasky had reason-

[5] The leading case is *United States* v. *Rabinowitz*, 339 U. S. 56.

able cause to make a forced stop. Unlike probable cause to arrest, reasonable grounds to stop do not depend on any degree of likelihood that a crime *has* been committed. An officer may forcibly intrude upon an incipient crime even where he could not make an arrest for the simple reason that there is nothing to arrest anyone for. Hence although Officer Lasky had small reason to believe that a crime had been committed, his right to stop Peters can be justified if he had a reasonable suspicion that Peters was about to attempt burglary.

It was clear that the officer had to act quickly if he was going to act at all, and, as stated above, it seems to me that where immediate action is obviously required, a police officer is justified in acting on rather less objectively articulable evidence than when there is more time for consideration of alternative courses of action. Perhaps more important, the Court's opinion in *Terry* emphasized the special qualifications of an experienced police officer. While "probable cause" to arrest or search has always depended on the existence of hard evidence that would persuade a "reasonable man," in judging on-the-street encounters it seems to me proper to take into account a police officer's trained instinctive judgment operating on a multitude of small gestures and actions impossible to reconstruct. Thus the statement by an officer that "he looked like a burglar to me" adds little to an affidavit filed with a magistrate in an effort to obtain a warrant. When the question is whether it was reasonable to take limited but forcible steps in a situation requiring immediate action, however, such a statement looms larger. A court is of course entitled to disbelieve the officer (who is subject to cross-examination), but when it believes him and when there are some articulable supporting facts, it is entitled to find action taken under fire to be reasonable.

Given Officer Lasky's statement of the circumstances, and crediting his experienced judgment as he watched the two men, the state courts were entitled to conclude, as they did, that Lasky forcibly stopped Peters on "reasonable suspicion." The frisk made incident to that stop was a limited one, which turned up burglar's tools. Although the frisk is constitutionally permitted only in order to protect the officer, if it is lawful the State is of course entitled to the use of any other contraband that appears.

For the foregoing reasons I concur in the result in these cases.

MR. JUSTICE BLACK, concurring in No. 74 and dissenting in No. 63.

I concur in the affirmance of the judgment against Peters but dissent from the reversal of No. 63, *Sibron* v. *New York,* and would affirm that conviction. Sibron was convicted of violating New York's anti-narcotics law on the basis of evidence seized from him by the police. The Court reverses on the ground that the narcotics were seized as the result of an unreasonable search in violation of the Fourth Amendment. The Court has decided today in *Terry* v. *Ohio* and in No. 74, *Peters* v. *New York,* that a policeman does not violate the Fourth Amendment when he makes a limited search for weapons on the person of a man who the policeman has probable cause to believe has a dangerous weapon on him with which he might injure the policeman or others or both, unless he is searched and the weapon is taken away from him. And, of course, under established principles it is not a violation of the Fourth Amendment for a policeman to search a person who he has probable cause to believe is committing a felony at the time. For both these reasons I think the seizure of the narcotics from Sibron was not unreasonable

under the Fourth Amendment. Because of a different emphasis on the facts, I find it necessary to restate them.

About 4 p. m. Patrolman Martin saw appellant Sibron in the vicinity of 742 Broadway. From then until 12 o'clock midnight Sibron remained there. During that time the policeman saw Sibron talking with six or eight persons whom the policeman knew from past experience to be narcotics addicts. Later, at about 12 o'clock, Sibron went into a restaurant and there the patrolman saw Sibron speak with three more known addicts. While Sibron was eating in the restaurant the policeman went to him and asked him to come out. Sibron came out. There the officer said to Sibron, "You know what I am after." Sibron mumbled something and reached into his left coat pocket. The officer also moved his hand to the pocket and seized what was in it, which turned out to be heroin. The patrolman testified at the hearing to suppress use of the heroin as evidence that he "thought he [Sibron] might have been" reaching for a gun.

Counsel for New York for some reason that I have not been able to understand, has attempted to confess error—that is, that for some reason the search or seizure here violated the Fourth Amendment. I agree with the Court that we need not and should not accept this confession of error. But, unlike the Court, I think, for two reasons, that the seizure did not violate the Fourth Amendment and that the heroin was properly admitted in evidence.

First. I think there was probable cause for the policeman to believe that when Sibron reached his hand to his coat pocket, Sibron had a dangerous weapon which he might use if it were not taken away from him. This, according to the Court's own opinion, seems to have been the ground on which the Court of Appeals of New York justified the search, since it "affirmed on the

basis of § 180–a, which authorizes such a search when the officer 'reasonably suspects that he is in danger of life or limb.'" *Ante*, at 63. And it seems to me to be a reasonable inference that when Sibron, who had been approaching and talking to addicts for eight hours, reached his hand quickly to his left coat pocket, he might well be reaching for a gun. And as the Court has emphasized today in its opinions in the other stop-and-frisk cases, a policeman under such circumstances has to act in a split second; delay may mean death for him. No one can know when an addict may be moved to shoot or stab, and particularly when he moves his hand hurriedly to a pocket where weapons are known to be habitually carried, it behooves an officer who wants to live to act at once as this officer did. It is true that the officer might also have thought Sibron was about to get heroin instead of a weapon. But the law enforcement officers all over the Nation have gained little protection from the courts through opinions here if they are now left helpless to act in self defense when a man associating intimately and continuously with addicts, upon meeting an officer, shifts his hand immediately to a pocket where weapons are constantly carried.

In appraising the facts as I have I realize that the Court has chosen to draw inferences different from mine and those drawn by the courts below. The Court for illustration draws inferences that the officer's testimony at the hearing continued upon the "plain premise that he had been looking for narcotics all the time." *Ante*, at 47, n. 4. But this Court is hardly, at this distance from the place and atmosphere of the trial, in a position to overturn the trial and appellate courts on its own independent finding of an unspoken "premise" of the officer's inner thoughts.

In acting upon its own findings and rejecting those of the lower state courts, this Court, sitting in the marble halls of the Supreme Court Building in Wash-

ington, D. C., should be most cautious. Due to our holding in *Mapp* v. *Ohio*, 367 U. S. 643, we are due to get for review literally thousands of cases raising questions like those before us here. If we are setting ourselves meticulously to review all such findings our task will be endless and many will rue the day when *Mapp* was decided. It is not only wise but imperative that where findings of the facts of reasonableness and probable cause are involved in such state cases, we should not overturn state court findings unless in the most extravagant and egregious errors. It seems fantastic to me even to suggest that this is such a case. I would leave these state court holdings alone.

Second, I think also that there was sufficient evidence here on which to base findings that after recovery of the heroin, in particular, an officer could reasonably believe there was probable cause to charge Sibron with violating New York's narcotics laws. As I have previously argued, there was, I think, ample evidence to give the officer probable cause to believe Sibron had a dangerous weapon and that he might use it. Under such circumstances the officer had a right to search him in the very limited fashion he did here. Since, therefore, this was a reasonable and justified search, the use of the heroin discovered by it was admissible in evidence.

I would affirm.

Syllabus.

FLAST ET AL. v. COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 416. Argued March 12, 1968.—Decided June 10, 1968.

Appellant taxpayers allege that federal funds have been disbursed by appellee federal officials under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and sectarian schools, in violation of the Establishment and Free Exercise Clauses of the First Amendment. Appellants sought a declaration that the expenditures were not authorized by the Act or, in the alternative, that the Act is to that extent unconstitutional, and requested the convening of a three-judge court. A three-judge court ruled, on the authority of *Frothingham* v. *Mellon*, 262 U. S. 447 (1923), that appellants lacked standing to maintain the action. *Held:*

1. The three-judge court was properly convened, as the constitutional attack, even though focused on the program's operations in New York City, would if successful affect the entire regulatory scheme of the statute, and the complaint alleged a constitutional ground for relief, albeit one coupled with an alternative nonconstitutional ground. Pp. 88–91.

2. There is no absolute bar in Art. III of the Constitution to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs since the taxpayers may or may not have the requisite personal stake in the outcome. Pp. 91–101.

3. To maintain an action challenging the constitutionality of a federal spending program, individuals must demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Art. III requirements. Pp. 102–103.

(a) Taxpayers must establish a logical link between that status and the type of legislative enactment attacked, as it will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. P. 102.

(b) Taxpayers must also establish a nexus between that status and the precise nature of the constitutional infringement alleged. They must show that the statute exceeds specific constitutional

limitations on the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. Pp. 102–103.

4. The taxpayer-appellants here have standing consistent with Art. III to invoke federal judicial power since they have alleged that tax money is being spent in violation of a specific constitutional protection against the abuse of legislative power, *i. e.*, the Establishment Clause of the First Amendment. *Frothingham* v. *Mellon, supra,* distinguished. Pp. 103–106.

271 F. Supp. 1, reversed.

Leo Pfeffer argued the cause for appellants. With him on the briefs were *David I. Ashe, Ernest Fleischman,* and *Alan H. Levine.*

Solicitor General Griswold argued the cause for appellees. With him on the brief were *Assistant Attorney General Weisl, Alan S. Rosenthal,* and *Robert V. Zener.*

Sam J. Ervin, Jr., argued the cause and filed a brief for Americans for Public Schools et al., as *amici curiae,* urging reversal.

Briefs of *amici curiae,* urging reversal, were filed by *Melvin J. Sykes* and *Sanford Jay Rosen* for the Council of Chief State School Officers et al.; by *Henry C. Clausen* for United Americans for Public Schools; by *Norman Dorsen* and *Charles H. Tuttle* for the National Council of Churches; by *Franklin C. Salisbury* for Protestants and Other Americans United for Separation of Church and State, and by *Arnold Forster, Edwin J. Lukas, Joseph B. Robison, Paul Hartman,* and *Sol Rabkin* for the American Jewish Committee et al.

Briefs of *amici curiae,* urging affirmance, were filed by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations; by *Julius Berman* and *Reuben E. Gross* for the National Jewish Commission on Law and Public Affairs, and by *Herbert Brownell, Thomas F. Daly,* and *William E. McCurdy, Jr.,* for Spira et al.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

In *Frothingham* v. *Mellon*, 262 U. S. 447 (1923), this Court ruled that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. That ruling has stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers. In this case, we must decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment.

Appellants filed suit in the United States District Court for the Southern District of New York to enjoin the allegedly unconstitutional expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, 20 U. S. C. §§ 241a *et seq.*, 821 *et seq.* (1964 ed., Supp. II). The complaint alleged that the seven appellants had as a common attribute that "each pay[s] income taxes of the United States," and it is clear from the complaint that the appellants were resting their standing to maintain the action solely on their status as federal taxpayers.[1] The appellees, who are charged by Congress with administering the Elementary and Secondary Education Act of 1965, were sued in their official capacities.

The gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks

[1] The complaint alleged that one of the appellants "has children regularly registered in and attending the elementary or secondary grades in the public schools of New York." However, the District Court did not view that additional allegation as being relevant to the question of standing, and appellants have made no effort to justify their standing on that additional ground.

and other instructional materials for use in such schools. Such expenditures were alleged to be in contravention of the Establishment and Free Exercise Clauses of the First Amendment. Appellants' constitutional attack focused on the statutory criteria which state and local authorities must meet to be eligible for federal grants under the Act. Title I of the Act establishes a program for financial assistance to local educational agencies for the education of low-income families. Federal payments are made to state educational agencies, which pass the payments on in the form of grants to local educational agencies. Under § 205 of the Act, 20 U. S. C. § 241e, a local educational agency wishing to have a plan or program funded by a grant must submit the plan or program to the appropriate state educational agency for approval. The plan or program must be "consistent with such basic criteria as the [appellee United States Commissioner of Education] may establish." The specific criterion of that section attacked by the appellants is the requirement

> "that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate . . . ." 20 U. S. C. § 241e (a)(2).

Under § 206 of the Act, 20 U. S. C. § 241f, the Commissioner of Education is given broad powers to supervise a State's participation in Title I programs and grants. Title II of the Act establishes a program of federal grants for the acquisition of school library resources, textbooks,

and other printed and published instructional materials "for the use of children and teachers in public and private elementary and secondary schools." 20 U. S. C. § 821. A State wishing to participate in the program must submit a plan to the Commissioner for approval, and the plan must

> "provide assurance that to the extent consistent with law such library resources, textbooks, and other instructional materials will be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools in the State . . . ." 20 U. S. C. § 823 (a)(3)(B).

While disclaiming any intent to challenge as unconstitutional all programs under Title I of the Act, the complaint alleges that federal funds have been disbursed under the Act, "with the consent and approval of the [appellees]," and that such funds have been used and will continue to be used to finance "instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools" and "the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." Such expenditures of federal tax funds, appellants alleged, violate the First Amendment because "they constitute a law respecting an establishment of religion" and because "they prohibit the free exercise of religion on the part of the [appellants] . . . by reason of the fact that they constitute compulsory taxation for religious purposes." The complaint asked for a declaration that appellees' actions in approving the expenditure of federal funds for the alleged purposes were not authorized by the Act or, in the alternative, that if appellees' actions are deemed within the authority and intent of the Act, "the Act is to that extent unconstitutional and void." The complaint also prayed for an injunction to enjoin appel-

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lees from approving any expenditure of federal funds for the allegedly unconstitutional purposes. The complaint further requested that a three-judge court be convened as provided in 28 U. S. C. §§ 2282, 2284.

The Government moved to dismiss the complaint on the ground that appellants lacked standing to maintain the action. District Judge Frankel, who considered the motion, recognized that *Frothingham* v. *Mellon, supra,* provided "powerful" support for the Government's position, but he ruled that the standing question was of sufficient substance to warrant the convening of a three-judge court to decide the question. 267 F. Supp. 351 (1967). The three-judge court received briefs and heard arguments limited to the standing question, and the court ruled on the authority of *Frothingham* that appellants lacked standing. Judge Frankel dissented. 271 F. Supp. 1 (1967). From the dismissal of their complaint on that ground, appellants appealed directly to this Court, 28 U. S. C. § 1253, and we noted probable jurisdiction. 389 U. S. 895 (1967). For reasons explained at length below, we hold that appellants do have standing as federal taxpayers to maintain this action, and the judgment below must be reversed.

I.

We must deal first with the Government's contention that this Court lacks jurisdiction on direct appeal because a three-judge court was improperly convened below.[2] Under 28 U. S. C. § 1253, direct appeal to this

[2] This issue was not raised in the court below, and the Government argued it for the first time in its brief in this Court. The Government claims the inappropriateness of convening a three-judge court became apparent only as the issues in the case have been clarified by appellants. Because the question now presented goes to our jurisdiction on direct appeal, the lateness of the claim is irrelevant to our consideration of it. *United States* v. *Griffin,* 303 U. S. 226, 229 (1938).

Court from a district court lies only "from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Thus, if the Government is correct, we lack jurisdiction over this direct appeal.

The Government's argument on this question is two-pronged. First, noting that appellants have conceded that the case should be deemed one limited to the practices of the New York City Board of Education, the Government contends that appellants wish only to forbid specific local programs which they find objectionable and not to enjoin the operation of the broad range of programs under the statutory scheme. Only if the latter relief is sought, the Government argues, can a three-judge court properly be convened under 28 U. S. C. § 2282. We cannot accept the Government's argument in the context of this case. It is true that the appellants' complaint makes specific reference to the New York City Board of Education's programs which are funded under the challenged statute, and we can assume that appellants' proof at trial would focus on those New York City programs. However, we view these allegations of the complaint as imparting specificity and focus to the issues in the lawsuit and not as limiting the impact of the constitutional challenge made in this case. The injunctive relief sought by appellants is not limited to programs in operation in New York City but extends to *any* program that would have the unconstitutional features alleged in the complaint. Congress enacted § 2282 "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order." *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 154 (1963). If the District Court in this case were to rule for appellants on the merits of their constitutional attack on New York

City's federally funded programs, that decision would cast sufficient doubt on similar programs elsewhere as to cause confusion approaching paralysis to surround the challenged statute. Therefore, even if the injunction which might issue in this case were narrower than that sought by appellants, we are satisfied that the legislative policy underlying § 2282 was served by the convening of a three-judge court, despite appellants' focus on New York City's programs.

Secondly, the Government argues that a three-judge court should not have been convened because appellants question not the constitutionality of the Elementary and Secondary Education Act of 1965 but its administration.[3] The decision in *Zemel* v. *Rusk*, 381 U. S. 1 (1965), is dispositive on this issue. It is true that appellants' complaint states a nonconstitutional ground for relief, namely, that appellees' actions in approving the expenditure of federal funds for allegedly unconstitutional programs are in excess of their authority under the Act. However, the complaint also requests an alternative and constitutional ground for relief, namely, a declaration that, if appellees' actions "are within the authority and intent of the Act, the Act is to that extent unconstitutional and void." The Court noted in *Zemel* v. *Rusk*, *supra*, "[W]e have often held that a litigant need not abandon his nonconstitutional arguments in order to ob-

[3] The Government also seems to argue that, if any administrative action is suspect, it is the action of state officials and not of appellees. For example, the Government describes federal participation in the challenged programs as "remote." Brief for Appellees 17. The premise for this argument is apparently that, under 20 U. S. C. § 241e, programs of local educational agencies require only the direct approval of state officials to be eligible for grants. However, appellees are given broad powers of supervision over state participation by 20 U. S. C. § 241f, and it is federal funds administered by appellees that finance the local programs. We cannot characterize such federal participation as "remote."

tain a three-judge court." 381 U. S., at 5–6. See also *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73 (1960); *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535 (1954). The complaint in this case falls within that rule.

Thus, since the three-judge court was properly convened below,[4] direct appeal to this Court is proper. We turn now to the standing question presented by this case.

II.

This Court first faced squarely[5] the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in a federal court in *Frothingham* v. *Mellon*, *supra*, and that decision must be the starting point for analysis in this case. The taxpayer in *Frothingham* attacked as unconstitutional the Maternity Act of 1921, 42 Stat. 224, which established a federal program of grants to those States which would undertake programs to reduce maternal and infant mortality. The taxpayer alleged that Congress, in enacting the challenged statute, had exceeded the powers delegated to it under Article I of the Constitution and had invaded the legislative province reserved to the several States by the Tenth Amendment. The taxpayer complained that the result of the allegedly unconstitutional enactment would be to increase her future federal tax

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[4] An additional requirement for the convening of a three-judge court is that the constitutional question presented be substantial. See *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962); *Ex parte Poresky*, 290 U. S. 30 (1933). The Government does not dispute the substantiality of the constitutional attack made by appellants on the Elementary and Secondary Education Act of 1965. See *Flast* v. *Gardner*, 267 F. Supp. 351, 352 (1967).

[5] In at least three cases prior to *Frothingham*, the Court accepted jurisdiction in taxpayer suits without passing directly on the standing question. *Wilson* v. *Shaw*, 204 U. S. 24, 31 (1907); *Millard* v. *Roberts*, 202 U. S. 429, 438 (1906); *Bradfield* v. *Roberts*, 175 U. S. 291, 295 (1899).

liability and "thereby take her property without due process of law." 262 U. S., at 486. The Court noted that a federal taxpayer's "interest in the moneys of the Treasury . . . is comparatively minute and indeterminable" and that "the effect upon future taxation, of any payment out of the [Treasury's] funds, . . . [is] remote, fluctuating and uncertain." *Id.*, at 487. As a result, the Court ruled that the taxpayer had failed to allege the type of "direct injury" necessary to confer standing. *Id.*, at 488.

Although the barrier *Frothingham* erected against federal taxpayer suits has never been breached, the decision has been the source of some confusion and the object of considerable criticism. The confusion has developed as commentators have tried to determine whether *Frothingham* establishes a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled.[6] The conflicting viewpoints are reflected in the arguments made to this Court by the parties in this case. The Government has pressed upon us the view that *Frothingham* announced a constitutional rule, compelled by the Article III limitations on federal court jurisdiction and grounded in considerations of the doctrine of separation of powers. Appellants, however, insist that

[6] The prevailing view of the commentators is that *Frothingham* announced only a nonconstitutional rule of self-restraint. See, *e. g.*, Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv. L. Rev. 255, 302–303 (1961); Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit, 12 Buffalo L. Rev. 35, 48–65 (1962); Davis, Standing to Challenge Governmental Action, 39 Minn. L. Rev. 353, 386–391 (1955). But see Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess., 465, 467–468 (1966) (statement of Prof. William D. Valente). The last-cited hearings contain the best collection of recent expression of views on this question.

Frothingham expressed no more than a policy of judicial self-restraint which can be disregarded when compelling reasons for assuming jurisdiction over a taxpayer's suit exist. The opinion delivered in *Frothingham* can be read to support either position.[7] The concluding sentence of the opinion states that, to take jurisdiction of the taxpayer's suit, "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." 262 U. S., at 489. Yet the concrete reasons given for denying standing to a federal taxpayer suggest that the Court's holding rests on something less than a constitutional foundation. For example, the Court conceded that standing had previously been conferred on municipal taxpayers to sue in that capacity. However, the Court viewed the interest of a federal taxpayer in total federal tax revenues as "comparatively minute and indeterminable" when measured against a municipal taxpayer's interest in a smaller city treasury. *Id.*, at 486–487. This suggests that the petitioner in *Frothingham* was denied standing not because she was a taxpayer but because her tax bill was not large enough. In addition, the Court spoke of the "attendant inconveniences" of entertaining that taxpayer's suit because it might open the door of federal courts to countless such suits "in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned." *Id.*, at 487. Such a statement suggests pure policy considerations.

[7] "Although the Court in the latter part of the opinion used language suggesting that it did not find the elements of a justiciable controversy present in the case, the case in its central aspect turns on application of the judicially formulated [*i. e.*, nonconstitutional] rules respecting standing." Hearings on S. 2097, *supra*, n. 6, at 503 (statement of Prof. Paul G. Kauper).

To the extent that *Frothingham* has been viewed as resting on policy considerations, it has been criticized as depending on assumptions not consistent with modern conditions. For example, some commentators have pointed out that a number of corporate taxpayers today have a federal tax liability running into hundreds of millions of dollars, and such taxpayers have a far greater monetary stake in the Federal Treasury than they do in any municipal treasury.[8] To some degree, the fear expressed in *Frothingham* that allowing one taxpayer to sue would inundate the federal courts with countless similar suits has been mitigated by the ready availability of the devices of class actions and joinder under the Federal Rules of Civil Procedure, adopted subsequent to the decision in *Frothingham*.[9] Whatever the merits of the current debate over *Frothingham*, its very existence suggests that we should undertake a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits.

III.

The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the

[8] See, *e. g.*, Hearings on S. 2097, supra, n. 6, at 493 (statement of Prof. Kenneth C. Davis); Note, 69 Yale L. J. 895, 917, and n. 127 (1960).

[9] Judge Frankel's dissent below also noted that federal courts have learned in recent years to cope effectively with "huge litigations" and "redundant actions." 271 F. Supp., at 17.

words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question,[10] when the parties are asking for an advisory opinion,[11] when the question sought to be adjudicated has been mooted by subsequent developments,[12] and when there is no standing to maintain the action.[13] Yet it remains true that "[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . ." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961).

Part of the difficulty in giving precise meaning and form to the concept of justiciability stems from the un-

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[10] See, *e. g.*, *Commercial Trust Co.* v. *Miller*, 262 U. S. 51 (1923); *Luther* v. *Borden*, 7 How. 1 (1849).

[11] See, *e. g.*, *United States* v. *Fruehauf*, 365 U. S. 146 (1961); *Muskrat* v. *United States*, 219 U. S. 346 (1911).

[12] See, *e. g.*, *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308 (1893).

[13] See, *e. g.*, *Tileston* v. *Ullman*, 318 U. S. 44 (1943); *Frothingham* v. *Mellon*, 262 U. S. 447 (1923).

certain historical antecedents of the case-and-controversy doctrine. For example, Mr. Justice Frankfurter twice suggested that historical meaning could be imparted to the concepts of justiciability and case and controversy by reference to the practices of the courts of Westminster when the Constitution was adopted. *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 150 (1951) (concurring opinion); *Coleman* v. *Miller*, 307 U. S. 433, 460 (1939) (separate opinion). However, the power of English judges to deliver advisory opinions was well established at the time the Constitution was drafted. 3 K. Davis, Administrative Law Treatise 127–128 (1958). And it is quite clear that "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." C. Wright, Federal Courts 34 (1963).[14] Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III. See *Muskrat* v. *United States*, 219 U. S. 346 (1911); 3 H. Johnston, Correspondence and Public Papers of John Jay 486–489 (1891) (correspondence between Secretary of State Jefferson and Chief Justice Jay). However, the rule against advisory opinions also recognizes that such suits often "are not pressed before the Court with that clear concreteness provided when a question emerges precisely

[14] The rule against advisory opinions was established as early as 1793, see 3 H. Johnston, Correspondence and Public Papers of John Jay 486–489 (1891), and the rule has been adhered to without deviation. See *United States* v. *Fruehauf*, 365 U. S. 146, 157 (1961), and cases cited therein.

framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *United States* v. *Fruehauf*, 365 U. S. 146, 157 (1961). Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

Additional uncertainty exists in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations. And a policy limitation is "not always clearly distinguished from the constitutional limitation." *Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953). For example, in his concurring opinion in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 345–348 (1936), Mr. Justice Brandeis listed seven rules developed by this Court "for its own governance" to avoid passing prematurely on constitutional questions. Because the rules operate in "cases confessedly within [the Court's] jurisdiction," *id.*, at 346, they find their source in policy, rather than purely constitutional, considerations. However, several of the cases cited by Mr. Justice Brandeis in illustrating the rules of self-governance articulated purely constitutional grounds for decision. See, *e. g.*, *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923); *Fairchild* v. *Hughes*, 258 U. S. 126 (1922); *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339 (1892). The "many subtle pressures" [15] which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours.

[15] *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961).

It is in this context that the standing question presented by this case must be viewed and that the Government's argument on that question must be evaluated. As we understand it, the Government's position is that the constitutional scheme of separation of powers, and the deference owed by the federal judiciary to the other two branches of government within that scheme, present an absolute bar to taxpayer suits challenging the validity of federal spending programs. The Government views such suits as involving no more than the mere disagreement by the taxpayer "with the uses to which tax money is put." [16] According to the Government, the resolution of such disagreements is committed to other branches of the Federal Government and not to the judiciary. Consequently, the Government contends that, under no circumstances, should standing be conferred on federal taxpayers to challenge a federal taxing or spending program.[17] An analysis of the function served by standing limitations compels a rejection of the Government's position.

Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability.

[16] Brief for Appellees 7.

[17] The logic of the Government's argument would compel it to concede that a taxpayer would lack standing even if Congress engaged in such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects. See *Flast* v. *Gardner*, 271 F. Supp. 1, 5 (1967) (dissenting opinion of Frankel, J.). The Government professes not to be bothered by such a result because it contends there might be individuals in society other than taxpayers who could invoke federal judicial power to challenge such unconstitutional appropriations. However, if as we conclude there are circumstances under which a taxpayer will be a proper and appropriate party to seek judicial review of federal statutes, the taxpayer's access to federal courts should not be barred because there might be at large in society a hypothetical plaintiff who might possibly bring such a suit.

Standing has been called one of "the most amorphous [concepts] in the entire domain of public law." [18] Some of the complexities peculiar to standing problems result because standing "serves, on occasion, as a shorthand expression for all the various elements of justiciability." [19] In addition, there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.[20]

Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is

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[18] Hearings on S. 2097, *supra*, n. 6, at 498 (statement of Prof. Paul A. Freund).

[19] Lewis, Constitutional Rights and the Misuse of "Standing," 14 Stan. L. Rev. 433, 453 (1962).

[20] Thus, a general standing limitation imposed by federal courts is that a litigant will ordinarily not be permitted to assert the rights of absent third parties. See, *e. g.*, *Heald* v. *District of Columbia*, 259 U. S. 114, 123 (1922); *Yazoo & Miss. Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217 (1912). However, this rule has not been imposed uniformly as a firm constitutional restriction on federal court jurisdiction. See, *e. g.*, *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487 (1965); *Barrows* v. *Jackson*, 346 U. S. 249 (1953).

challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.[21] Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question.[22] A proper party is demanded so that federal courts will not be asked to decide "ill-defined controversies over constitutional issues," *United Public Workers* v. *Mitchell,* 330 U. S. 75, 90 (1947), or a case which is of "a hypothetical or abstract character," *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 240 (1937). So stated, the standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits, *Chicago & Grand Trunk R. Co.* v. *Wellman, supra,* or those which are feigned or collusive in nature, *United States* v. *Johnson,* 319 U. S. 302 (1943); *Lord* v. *Veazie,* 8 How. 251 (1850).

When the emphasis in the standing problem is placed on whether the person invoking a federal court's jurisdiction is a proper party to maintain the action, the weakness of the Government's argument in this case becomes apparent. The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such prob-

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[21] This distinction has not always appeared with clarity in prior cases. See Bickel, Foreword: The Passive Virtues, The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 75–76 (1961).

[22] One contemporary commentator advanced such an explanation for the holding in *Frothingham,* suggesting that the standing rationale was simply a device used by the Court to avoid judicial inquiry into questions of social policy and the political wisdom of Congress. See Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338, 359–364 (1924).

lems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," *Baker* v. *Carr, supra,* at 204, and whether the dispute touches upon "the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth, supra,* at 240–241. A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs. There remains, however, the problem of determining the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that impart the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III.

IV.

The various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated. We have noted that, in deciding the question of standing, it is not relevant that the substantive issues in the litigation might be nonjusticiable. However, our decisions

establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. For example, standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause. See *McGowan* v. *Maryland*, 366 U. S. 420, 429–430 (1961). Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power. Thus, our point of reference in this case is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program. Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* v. *Board of Education*, 342 U. S. 429 (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds

specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds.[23] In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if

[23] Almost $1,000,000,000 was appropriated to implement the Elementary and Secondary Education Act in 1965. 79 Stat. 832.

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government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.[24] The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment [25] operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.

The allegations of the taxpayer in *Frothingham* v. *Mellon, supra,* were quite different from those made in this case, and the result in *Frothingham* is consistent with the test of taxpayer standing announced today. The taxpayer in *Frothingham* attacked a federal spending program and she, therefore, established the first nexus

[24] The Memorial and Remonstrance was Madison's impassioned reaction to a bill introduced in the Virginia General Assembly in 1785 to provide a tax levy to support teachers of the Christian religion. Madison's eloquent opposition to the levy generated strong support in Virginia, and the Assembly postponed consideration of the proposal until its next session. When the bill was revived, it died in committee and the Assembly instead enacted the famous Virginia Bill for Religious Liberty authored by Thomas Jefferson. The Virginia experience is recounted in S. Cobb, Rise of Religious Liberty in America 490–499 (1902).

[25] Appellants have also alleged that the Elementary and Secondary Education Act of 1965 violates the Free Exercise Clause of the First Amendment. This Court has recognized that the taxing power can be used to infringe the free exercise of religion. *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943). Since we hold that appellants' Establishment Clause claim is sufficient to establish the nexus between their status and the precise nature of the constitutional infringement alleged, we need not decide whether the Free Exercise claim, standing alone, would be adequate to confer standing in this case. We do note, however, that the challenged tax in *Murdock* operated upon a particular class of taxpayers. When such exercises of the taxing power are challenged, the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers within the affected class.

required. However, she lacked standing because her constitutional attack was not based on an allegation that Congress, in enacting the Maternity Act of 1921, had breached a specific limitation upon its taxing and spending power. The taxpayer in *Frothingham* alleged essentially that Congress, by enacting the challenged statute, had exceeded the general powers delegated to it by Art. I, § 8, and that Congress had thereby invaded the legislative province reserved to the States by the Tenth Amendment. To be sure, Mrs. Frothingham made the additional allegation that her tax liability would be increased as a result of the allegedly unconstitutional enactment, and she framed that allegation in terms of a deprivation of property without due process of law. However, the Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability, and the taxpayer in *Frothingham* failed to make any additional claim that the harm she alleged resulted from a breach by Congress of the specific constitutional limitations imposed upon an exercise of the taxing and spending power. In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power.

We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that a taxpayer will have stand-

ing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review. Under such circumstances, we feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution. We lack that confidence in cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.

While we express no view at all on the merits of appellants' claims in this case,[26] their complaint contains sufficient allegations under the criteria we have outlined to give them standing to invoke a federal court's jurisdiction for an adjudication on the merits.

Reversed.

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[26] In fact, it is impossible to make any such judgment in the present posture of this case. The proceedings in the court below thus far have been devoted solely to the threshold question of standing, and nothing in the record bears upon the merits of the substantive questions presented in the complaint.

MR. JUSTICE DOUGLAS, concurring.

While I have joined the opinion of the Court, I do not think that the test it lays down is a durable one for the reasons stated by my Brother HARLAN. I think, therefore, that it will suffer erosion and in time result in the demise of *Frothingham* v. *Mellon,* 262 U. S. 447. It would therefore be the part of wisdom, as I see the problem, to be rid of *Frothingham* here and now.

I do not view with alarm, as does my Brother HARLAN, the consequences of that course. *Frothingham,* decided in 1923, was in the heyday of substantive due process, when courts were sitting in judgment on the wisdom or reasonableness of legislation. The claim in *Frothingham* was that a federal regulatory Act dealing with maternity deprived the plaintiff of property without due process of law. When the Court used substantive due process to determine the wisdom or reasonableness of legislation, it was indeed transforming itself into the Council of Revision which was rejected by the Constitutional Convention. It was that judicial attitude, not the theory of standing to sue rejected in *Frothingham,* that involved "important hazards for the continued effectiveness of the federal judiciary," to borrow a phrase from my Brother HARLAN. A contrary result in *Frothingham* in that setting might well have accentuated an ominous trend to judicial supremacy.

But we no longer undertake to exercise that kind of power. Today's problem is in a different setting.

Most laws passed by Congress do not contain even a ghost of a constitutional question. The "political" decisions, as distinguished from the "justiciable" ones, occupy most of the spectrum of congressional action. The case or controversy requirement comes into play only when the Federal Government does something that affects a person's life, his liberty, or his property. The wrong may be slight or it may be grievous. Madison in denouncing

state support of churches said the principle was violated when even "three pence" was appropriated to that cause by the Government.[1] It therefore does not do to talk about taxpayers' interest as "infinitesimal." The restraint on "liberty" may be fleeting and passing and still violate a fundamental constitutional guarantee. The "three pence" mentioned by Madison may signal a monstrous invasion by the Government into church affairs, and so on.

The States have experimented with taxpayers' suits and with only two exceptions [2] now allow them. A few state decisions are frankly based on the theory that a taxpayer is a private attorney general seeking to vindicate the public interest.[3] Some of them require that the taxpayer have more than an infinitesimal financial stake in the problem.[4] At the federal level, Congress can of

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[1] Memorial and Remonstrance against Religious Assessments, 2 Writings of James Madison 186 (Hunt ed. 1901).

[2] The two clear exceptions are municipal taxpayers' suits in Kansas (see *Asendorf* v. *Common School Dist. No. 102*, 175 Kan. 601, 266 P. 2d 309 (1954)) and state taxpayers' suits in New York (see *Schieffelin* v. *Komfort*, 212 N. Y. 520, 106 N. E. 675 (1914); *St. Clair* v. *Yonkers Raceway*, 13 N. Y. 2d 72, 242 N. Y. S. 2d 43, 192 N. E. 2d 15 (1963); but see *Kuhn* v. *Curran*, 294 N. Y. 207, 61 N. E. 2d 513 (1945)).

[3] See, *e. g.*, *Clapp* v. *Town of Jaffrey*, 97 N. H. 456, 91 A. 2d 464 (1952); *Vibberts* v. *Hart*, 85 R. I. 35, 125 A. 2d 193 (1956); *Lien* v. *Northwestern Engineering Co.*, 74 S. D. 476, 54 N. W. 2d 472 (1952). ("It is now the settled law of this state that a taxpayer or elector having no special interest may institute an action to protect a public right." 74 S. D., at 479, 54 N. W. 2d, at 474.)

[4] See, *e. g.*, *Crews* v. *Beattie*, 197 S. C. 32, 14 S. E. 2d 351 (1941); *Goodland* v. *Zimmerman*, 243 Wis. 459, 10 N. W. 2d 180 (1943) (taxpayer may not enjoin state expenditure of $1.49); contra, *Richardson* v. *Blackburn*, 41 Del. Ch. 54, 187 A. 2d 823 (1963); *Woodard* v. *Reily*, 244 La. 337, 152 So. 2d 41 (1963).

The estimates of commentators as to how many jurisdictions have specifically upheld taxpayers' suits range from 32 to 40. See

course define broad categories of "aggrieved" persons who have standing to litigate cases or controversies. But, contrary to what my Brother HARLAN suggests, the failure of Congress to act has not barred this Court from allowing standing to sue and from providing remedies. The multitude of cases under the Fourth, as well as the Fourteenth Amendment, are witness enough.[5]

The constitutional guide is "cases" or "controversies" within the meaning of § 2 of Art. III of the Constitution. As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III. See *Ex parte McCardle*, 7 Wall. 506. But where there is judicial power to act, there is judicial power to deal with all the facets of the old issue of standing.

Taxpayers can be vigilant private attorneys general. Their stake in the outcome of litigation may be *de minimis* by financial standards, yet very great when measured by a particular constitutional mandate. My Brother HARLAN's opinion reflects the British, not the American, tradition of constitutionalism. We have a written Constitution; and it is full of "thou shalt nots" directed at Congress and the President as well as at the courts.

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generally 3 K. Davis, Administrative Law Treatise § 22.09 (1958), §§ 22.09–22.10 (1965 Supp.); Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1276–1281 (1961); Comment, Taxpayers' Suits: A Survey and Summary, 69 Yale L. J. 895 (1960); *St. Clair* v. *Yonkers Raceway*, 13 N. Y. 2d 72, 77–81, 242 N. Y. S. 2d 43, 45–49, 192 N. E. 2d 15, 16–19 (1963) (dissenting opinion of Fuld, J.).

[5] See, *e. g.*, *NAACP* v. *Alabama*, 357 U. S. 449; *Pierce* v. *Society of Sisters*, 268 U. S. 510. As the Court said in *Barrows* v. *Jackson*, 346 U. S. 249, 255, apart from Article III jurisdictional questions, standing involves a "rule of self-restraint for its own governance" which "this Court has developed" itself. And attempts by Congress to confer standing when it is constitutionally lacking are unavailing. *Muskrat* v. *United States*, 219 U. S. 346.

And the role of the federal courts is not only to serve as referee between the States and the center but also to protect the individual against prohibited conduct by the other two branches of the Federal Government.

There has long been a school of thought here that the less the judiciary does, the better. It is often said that judicial intrusion should be infrequent, since it is "always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors"; that the effect of a participation by the judiciary in these processes is "to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." J. Thayer, John Marshall 106, 107 (1901).

The late Edmond Cahn, who opposed that view, stated my philosophy. He emphasized the importance of the role that the federal judiciary was designed to play in guarding basic rights against majoritarian control. He chided the view expressed by my Brother HARLAN: "we are entitled to reproach the majoritarian justices of the Supreme Court . . . with straining to be reasonable when they ought to be adamant." Can the Supreme Court Defend Civil Liberties? in Samuel, ed., Toward a Better America 132, 144 (1968). His description of our constitutional tradition was in these words:

> "Be not reasonable with inquisitions, anonymous informers, and secret files that mock American justice. Be not reasonable with punitive denationalizations, ex post facto deportations, labels of disloyalty, and all the other stratagems for outlawing human beings from the community of mankind. These devices have put us to shame. Exercise the full judicial power of the United States; nullify

them, forbid them; and make us proud again." *Id.*, 144–145.

The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. If the judiciary were to become a super-legislative group sitting in judgment on the affairs of people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.

Marshall wrote in *Marbury* v. *Madison*, 1 Cranch 137, 178, that if the judiciary stayed its hand in deference to the legislature, it would give the legislature "a practical and real omnipotence." My Brother HARLAN's view would do just that, for unless Congress created a procedure through which its legislative creation could be challenged quickly and with ease, the momentum of what it had done would grind the dissenter under.

We have a Constitution designed to keep government out of private domains. But the fences have often been broken down; and *Frothingham* denied effective machinery to restore them. The Constitution even with the judicial gloss it has acquired plainly is not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive Branches. He faces a formidable opponent in government, even when he is endowed with funds and with courage. The individual is almost certain to be plowed under, unless he has a well-organized active political group to speak for him. The church is one. The press is another. The union is a third. But if a powerful sponsor is lacking, individual liberty withers—in spite of glowing opinions and resounding constitutional phrases.

I would not be niggardly therefore in giving private attorneys general standing to sue. I would certainly not

wait for Congress to give its blessing to our deciding cases clearly within our Article III jurisdiction. To wait for a sign from Congress is to allow important constitutional questions to go undecided and personal liberty unprotected.

There need be no inundation of the federal courts if taxpayers' suits are allowed. There is a wise judicial discretion that usually can distinguish between the frivolous question and the substantial question, between cases ripe for decision and cases that need prior administrative processing, and the like.[6] When the judiciary is no longer "a great rock" [7] in the storm, as Lord Sankey once put it, when the courts are niggardly in the use of their power and reach great issues only timidly and reluctantly, the force of the Constitution in the life of the Nation is greatly weakened.

Gideon Hausner, after reviewing the severe security measures sometimes needed for Israel's survival and the vigilance of her courts in maintaining the rights of individuals, recently stated, "When all is said and done, one is inclined to think that a rigid constitutional frame is on the whole preferable even if it serves no better purpose than obstructing and embarrassing an over-active Executive." Individuals' Rights in the Courts of Israel, International Lawyers Convention In Israel, 1958, pp. 201, 228 (1959).

That observation is apt here, whatever the transgression and whatever branch of government may be implicated. We have recently reviewed the host of devices

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[6] "The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even in successful litigation, and the discretion of the court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks." *Ferry* v. *Williams*, 41 N. J. L. 332, 339 (Sup. Ct. 1879).

[7] Quoted in the Law Times, March 17, 1928, at 242.

used by the States to avoid opening to Negroes public facilities enjoyed by whites. *Green* v. *School Board of New Kent County,* 391 U. S. 430; *Raney* v. *Board of Education,* 391 U. S. 443; *Monroe* v. *Board of Commissioners,* 391 U. S. 450. There is a like process at work at the federal level in respect to aid to religion. The efforts made to insert in the law an express provision which would allow federal aid to sectarian schools to be reviewable in the courts was defeated.[8] The mounting federal aid to sectarian schools is notorious and the subterfuges numerous.[9]

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[8] These efforts, commencing in 1961, are discussed in S. Rep. No. 85, 90th Cong., 1st Sess., 2–3 (1967), and S. Rep. No. 473, 90th Cong., 1st Sess., 10–15 (1967). The Senate added such a provision to the Higher Education Facilities Act of 1963, but it did not survive conference. S. Rep. No. 85, at 2. A bill, S. 3, to make certain "establishment" questions reviewable has been reported by the Senate in the Ninetieth Congress.

[9] "Tuition grants to parents of students in church schools is considered by the clerics and their helpers to have possibilities. The idea here is that the parent receives the money, carries it down to the school, and gives it to the priest. Since the money pauses a moment with the parent before going to the priest, it is argued that this evades the constitutional prohibition against government money for religion! This is a diaphanous trick which seeks to do indirectly what may not be done directly.

"Another one is the 'authority.' The state may not grant aid directly to church schools. But how about setting up an authority—like the Turnpike Authority? The state could give the money to the authority which, under one pretext or another, could channel it into the church schools.

"Yet another favorite of those who covet sectarian subsidies is 'child benefit.' Government may not aid church schools, but it may aid the children in the schools. The trouble with this argument is that it proves too much. Anything that is done for a school would presumably be of some benefit to the children in it. Government could even build church school classrooms, under this theory, because it would benefit the children to have nice rooms to study in." 21 Church & State (June 1968), p. 5 (editorial).

I would be as liberal in allowing taxpayers standing to object to these violations of the First Amendment as I would in granting standing to people to complain of any invasion of their rights under the Fourth Amendment or the Fourteenth or under any other guarantee in the Constitution itself or in the Bill of Rights.

MR. JUSTICE STEWART, concurring.

I join the judgment and opinion of the Court, which I understand to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment. Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution. The present case is thus readily distinguishable from *Frothingham* v. *Mellon*, 262 U. S. 447, where the taxpayer did not rely on an explicit constitutional prohibition but instead questioned the scope of the powers delegated to the national legislature by Article I of the Constitution.

As the Court notes, "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Ante*, at 103. Today's decision no more than recognizes that the appellants have a clear stake as taxpayers in assuring that they not be compelled to contribute even "three pence . . . of [their] property for the support of any one establishment." *Ibid.* In concluding that the appellants therefore have standing to sue, we do not undermine the salutary principle, established by *Frothingham* and reaffirmed today, that a taxpayer may not "employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Ante*, at 106.

MR. JUSTICE FORTAS, concurring.

I would confine the ruling in this case to the proposition that a taxpayer may maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the Establishment Clause. As the Court's opinion recites, there is enough in the constitutional history of the Establishment Clause to support the thesis that this Clause includes a *specific* prohibition upon the use of the power to tax to support an establishment of religion.* There is no reason to suggest, and no basis in the logic of this decision for implying, that there may be other types of congressional expenditures which may be attacked by a litigant solely on the basis of his status as a taxpayer.

I agree that *Frothingham* does not foreclose today's result. I agree that the congressional powers to tax and spend are limited by the prohibition upon Congress to enact laws "respecting an establishment of religion." This thesis, slender as its basis is, provides a direct "nexus," as the Court puts it, between the use and collection of taxes and the congressional action here. Because of this unique "nexus," in my judgment, it is not far-fetched to recognize that a taxpayer has a special claim to status as a litigant in a case raising the "establishment" issue. This special claim is enough, I think, to permit us to allow the suit, coupled, as it is, with the interest which the taxpayer and all other citizens have in the church-state issue. In terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer—and upon the life of all citizens.

Perhaps the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status,

*See *ante*, at 104, n. 24.

would be acceptable as a basis for this challenge. We need not decide this. But certainly, I believe, we must recognize that our principle of judicial scrutiny of legislative acts which raise important constitutional questions requires that the issue here presented—the separation of state and church—which the Founding Fathers regarded as fundamental to our constitutional system—should be subjected to judicial testing. This is not a question which we, if we are to be faithful to our trust, should consign to limbo, unacknowledged, unresolved, and undecided.

On the other hand, the urgent necessities of this case and the precarious opening through which we find our way to confront it, do not demand that we open the door to a general assault upon exercises of the spending power. The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause. See concurring opinion of STEWART, J., *ante*, p. 114.

MR. JUSTICE HARLAN, dissenting.

The problems presented by this case are narrow and relatively abstract, but the principles by which they must be resolved involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system. The nub of my view is that the end result of *Frothingham* v. *Mellon*, 262 U. S. 447, was correct, even though, like others,[1] I do not subscribe to all of its reasoning and premises. Although I therefore agree with certain of the conclusions reached today by the Court,[2] I cannot accept the standing doctrine

[1] See, *e. g.*, Davis, Standing to Challenge Governmental Action, 39 Minn. L. Rev. 353; L. Jaffe, Judicial Control of Administrative Action 483–495 (1965).

[2] In particular, I agree, essentially for the reasons stated by the Court, that we do not lack jurisdiction under 28 U. S. C. § 1253 to consider the judgment of the three-judge District Court.

that it substitutes for *Frothingham*, for it seems to me that this new doctrine rests on premises that do not withstand analysis. Accordingly, I respectfully dissent.

I.

It is desirable first to restate the basic issues in this case. The question here is not, as it was not in *Frothingham*, whether "a federal taxpayer is without standing to challenge the constitutionality of a federal statute." *Ante*, at 85. It could hardly be disputed that federal taxpayers may, as taxpayers, contest the constitutionality of tax obligations imposed severally upon them by federal statute. Such a challenge may be made by way of defense to an action by the United States to recover the amount of a challenged tax debt, see, *e. g.*, *Hylton* v. *United States*, 3 Dall. 171; *McCray* v. *United States*, 195 U. S. 27; *United States* v. *Butler*, 297 U. S. 1; or to a prosecution for willful failure to pay or to report the tax. See, *e. g.*, *Marchetti* v. *United States*, 390 U. S. 39. Moreover, such a challenge may provide the basis of an action by a taxpayer to obtain the refund of a previous tax payment. See, *e. g.*, *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20.

The lawsuits here and in *Frothingham* are fundamentally different. They present the question whether federal taxpayers *qua* taxpayers may, in suits in which they do not contest the validity of their previous or existing tax obligations, challenge the constitutionality of the uses for which Congress has authorized the expenditure of public funds. These differences in the purposes of the cases are reflected in differences in the litigants' interests. An action brought to contest the validity of tax liabilities assessed to the plaintiff is designed to vindicate interests that are personal and proprietary. The wrongs alleged and the relief sought by such a plaintiff are unmistakably private; only secondarily are his interests representative of those of the general population. I take

it that the Court, although it does not pause to examine the question, believes that the interests of those who as taxpayers challenge the constitutionality of public expenditures may, at least in certain circumstances, be similar. Yet this assumption is surely mistaken.[3]

The complaint in this case, unlike that in *Frothingham*, contains no allegation that the contested expenditures will in any fashion affect the amount of these taxpayers' own existing or foreseeable tax obligations. Even in cases in which such an allegation is made, the suit cannot result in an adjudication either of the plaintiff's tax liabilities or of the propriety of any particular level of taxation. The relief available to such a plaintiff consists entirely of the vindication of rights held in common by all citizens. It is thus scarcely surprising that few of the state courts that permit such suits require proof either that the challenged expenditure is consequential in amount or that it is likely to affect significantly the plaintiff's own tax bill; these courts have at least impliedly recognized that such allegations are surplusage, useful only to preserve the form of an obvious fiction.[4]

Nor are taxpayers' interests in the expenditure of public funds differentiated from those of the general public by any special rights retained by them in their tax payments. The simple fact is that no such rights can sensibly be said to exist. Taxes are ordinarily levied by the United States without limitations of purpose; absent such a limitation, payments received by the Treasury in satisfaction of tax obligations lawfully created become part of the Government's general funds. The national legislature is required by the Constitution to

[3] I put aside, for the moment, the suggestion that a taxpayer's rights under the Establishment Clause are more "personal" than they are under any other constitutional provision.

[4] See generally Comment, Taxpayers' Suits: A Survey and Summary, 69 Yale L. J. 895, 905–906.

exercise its spending powers to "provide for the common Defence and general Welfare." Art. I, § 8, cl. 1. Whatever other implications there may be to that sweeping phrase, it surely means that the United States holds its general funds, not as stakeholder or trustee for those who have paid its imposts, but as surrogate for the population at large. Any rights of a taxpayer with respect to the purposes for which those funds are expended are thus subsumed in, and extinguished by, the common rights of all citizens. To characterize taxpayers' interests in such expenditures as proprietary or even personal either deprives those terms of all meaning or postulates for taxpayers a *scintilla juris* in funds that no longer are theirs.

Surely it is plain that the rights and interests of taxpayers who contest the constitutionality of public expenditures are markedly different from those of "Hohfeldian" plaintiffs,[5] including those taxpayer-plaintiffs who challenge the validity of their own tax liabilities. We must recognize that these non-Hohfeldian plaintiffs complain, just as the petitioner in *Frothingham* sought to complain, not as taxpayers, but as "private attorneys-general." [6] The interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general

[5] The phrase is Professor Jaffe's, adopted, of course, from W. Hohfeld, Fundamental Legal Conceptions (1923). I have here employed the phrases "Hohfeldian" and "non-Hohfeldian" plaintiffs to mark the distinction between the personal and proprietary interests of the traditional plaintiff, and the representative and public interests of the plaintiff in a public action. I am aware that we are confronted here by a spectrum of interests of varying intensities, but the distinction is sufficiently accurate, and convenient, to warrant its use at least for purposes of discussion.

[6] Cf. *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704; *Reade* v. *Ewing*, 205 F. 2d 630, 632.

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population, taxpayers and nontaxpayers alike. These are and must be, to adopt Professor Jaffe's useful phrase, "public actions" brought to vindicate public rights.[7]

It does not, however, follow that suits brought by non-Hohfeldian plaintiffs are excluded by the "case or controversy" clause of Article III of the Constitution from the jurisdiction of the federal courts. This and other federal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as "representatives of the public interest." *Scripps-Howard Radio* v. *Comm'n*, 316 U. S. 4, 14. See also *Commission* v. *Sanders Radio Station*, 309 U. S. 470, 477; *Associated Industries* v. *Ickes*, 134 F. 2d 694; *Reade* v. *Ewing*, 205 F. 2d 630; *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F. 2d 608; *Office of Communication of United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 359 F. 2d 994. Compare *Oklahoma* v. *Civil Service Comm'n*, 330 U. S. 127, 137–139. And see, on actions *qui tam*, *Marvin* v. *Trout*, 199 U. S. 212, 225; *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 546. The various lines of authority are by no means free of difficulty, and certain of the cases may be explicable as involving a personal, if remote, economic interest, but I think that it is, nonetheless, clear that non-Hohfeldian plaintiffs as such are not *constitutionally* excluded from the federal courts. The problem ultimately presented by this case is, in my view, therefore to determine in what circumstances, consonant with the character and proper functioning of the federal courts, such suits should be permitted.[8] With this preface, I shall examine the position adopted by the Court.

[7] L. Jaffe, Judicial Control of Administrative Action 483 (1965).

[8] I agree that implicit in this question is the belief that the federal courts may decline to accept for adjudication cases or questions that, although otherwise within the perimeter of their constitutional jurisdiction, are appropriately thought to be unsuitable at

II.

As I understand it, the Court's position is that it is unnecessary to decide in what circumstances public actions should be permitted, for it is possible to identify situations in which taxpayers who contest the constitutionality of federal expenditures assert "personal" rights and interests, identical in principle to those asserted by Hohfeldian plaintiffs. This position, if supportable, would of course avoid many of the difficulties of this case; indeed, if the Court is correct, its extended exploration of the subtleties of Article III is entirely unnecessary. But, for reasons that follow, I believe that the Court's position is untenable.

The Court's analysis consists principally of the observation that the requirements of standing are met if a taxpayer has the "requisite personal stake in the outcome" of his suit. *Ante,* at 101. This does not, of course, resolve the standing problem; it merely restates it. The Court implements this standard with the declaration that taxpayers will be "deemed" to have the necessary personal interest if their suits satisfy two criteria: *first,* the challenged expenditure must form part of a federal spending program, and not merely be "incidental" to a regulatory program; and *second,* the constitutional provision under which the plaintiff claims must be a "specific limitation" upon Congress' spending powers. The difficulties with these criteria are many and severe, but it is enough for the moment to emphasize that they are not in any sense a measurement of any plaintiff's interest in the outcome of any suit. As even a cursory examination of

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least for immediate judicial resolution. Compare *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 345–348 (concurring opinion); H. Wechsler, Principles, Politics, and Fundamental Law 9–15 (1961); and Bickel, Foreword: The Passive Virtues, The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 45–47 (1961).

the criteria will show, the Court's standard for the determination of standing and its criteria for the satisfaction of that standard are entirely unrelated.

It is surely clear that a plaintiff's interest in the outcome of a suit in which he challenges the constitutionality of a federal expenditure is not made greater or smaller by the unconnected fact that the expenditure is, or is not, "incidental" to an "essentially regulatory" program.[9] An example will illustrate the point. Assume that two independent federal programs are authorized by Congress, that the first is designed to encourage a specified religious group by the provision to it of direct grants-in-aid, and that the second is designed to discourage all other religious groups by the imposition of various forms of discriminatory regulation. Equal amounts are appropriated by Congress for the two programs. If a taxpayer challenges their constitutionality in separate suits,[10] are we to suppose, as evidently does the Court, that his

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[9] I must note at the outset that I cannot determine with any certainty the Court's intentions with regard to this first criterion. Its use of *Doremus* v. *Board of Education*, 342 U. S. 429, as an analogue perhaps suggests that it intends to exclude only those cases in which there are virtually no public expenditures. See, *e. g.*, *Howard* v. *City of Boulder*, 132 Colo. 401, 290 P. 2d 237. On the other hand, the Court also emphasizes that the contested programs may not be "essentially regulatory" programs, and that the statute challenged here "involves a *substantial* expenditure of federal tax funds." *Ante*, at 102, 103 (emphasis added). Presumably this means that the Court's standing doctrine also excludes any program in which the expenditures are "insubstantial" or which cannot be characterized as a "spending" program.

[10] I am aware that the attack upon the second program would presumably be premised, at least in large part, upon the Free Exercise Clause, and that the Court does not today hold that that clause is within its standing doctrine. I cannot, however, see any meaningful distinction for these purposes, even under the Court's reasoning, between the two religious clauses.

"personal stake" in the suit involving the second is necessarily smaller than it is in the suit involving the first, and that he should therefore have standing in one but not the other?

Presumably the Court does not believe that regulatory programs are necessarily less destructive of First Amendment rights, or that regulatory programs are necessarily less prodigal of public funds than are grants-in-aid, for both these general propositions are demonstrably false. The Court's disregard of regulatory expenditures is not even a logical consequence of its apparent assumption that taxpayer-plaintiffs assert essentially monetary interests, for it surely cannot matter to a taxpayer *qua* taxpayer whether an unconstitutional expenditure is used to hire the services of regulatory personnel or is distributed among private and local governmental agencies as grants-in-aid. His interest as taxpayer arises, if at all, from the fact of an unlawful expenditure, and not as a consequence of the expenditure's form. Apparently the Court has repudiated the emphasis in *Frothingham* upon the amount of the plaintiff's tax bill, only to substitute an equally irrelevant emphasis upon the form of the challenged expenditure.

The Court's second criterion is similarly unrelated to its standard for the determination of standing. The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a "specific limitation" upon Congress' spending powers. Thus, among the claims in *Frothingham* was the assertion that the Maternity Act, 42 Stat. 224, deprived the petitioner of property without due process of law. The Court has evidently concluded that this claim did not confer standing because the Due Process Clause of the Fifth Amendment is not a specific limitation upon the spending

powers.[11] Disregarding for the moment the formidable obscurity of the Court's categories, how can it be said that Mrs. Frothingham's interests in her suit were, as a consequence of her choice of a constitutional claim, necessarily less intense than those, for example, of the present appellants? I am quite unable to understand how, if a taxpayer believes that a given public expenditure is unconstitutional, and if he seeks to vindicate that belief in a federal court, his interest in the suit can be said necessarily to vary according to the constitutional provision under which he states his claim.

The absence of any connection between the Court's standard for the determination of standing and its criteria for the satisfaction of that standard is not merely a logical ellipsis. Instead, it follows quite relentlessly from the fact that, despite the Court's apparent belief, the plaintiffs in this and similar suits are non-Hohfeldian, and it is very nearly impossible to measure sensibly any differences in the intensity of their personal interests in their suits. The Court has thus been compelled simply to postulate situations in which such taxpayer-plaintiffs will be "deemed" to have the requisite "personal stake and interest." *Ante*, at 101. The logical inadequacies of the Court's criteria are thus a reflection of the deficiencies of its entire position. These deficiencies will, however, appear more plainly from an examination of the Court's treatment of the Establishment Clause.

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[11] It should be emphasized that the Court finds it unnecessary to examine the history of the Due Process Clause to determine whether it was intended as a "specific limitation" upon Congress' spending and taxing powers. Nor does the Court pause to examine the purposes of the Tenth Amendment, another of the premises of the constitutional claims in *Frothingham*. But see *Gibbons* v. *Ogden*, 9 Wheat. 1, 199; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541; *United States* v. *Butler*, 297 U. S. 1. And compare *Everson* v. *Board of Education*, 330 U. S. 1, 6.

Although the Court does not altogether explain its position, the essence of its reasoning is evidently that a taxpayer's claim under the Establishment Clause is "not merely one of ultra vires," but one which instead asserts "an abridgment of individual religious liberty" and a "governmental infringement of individual rights protected by the Constitution." Choper, The Establishment Clause and Aid to Parochial Schools, 56 Calif. L. Rev. 260, 276. It must first be emphasized that this is apparently not founded upon any "preferred" position for the First Amendment, or upon any asserted unavailability of other plaintiffs.[12] The Court's position is instead that, because of the Establishment Clause's historical purposes, taxpayers retain rights under it quite different from those held by them under other constitutional provisions.

The difficulties with this position are several. First, we have recently been reminded that the historical purposes of the religious clauses of the First Amendment are significantly more obscure and complex than this Court has heretofore acknowledged.[13] Careful students

[12] The Court does make one reference to the availability *vel non* of other plaintiffs. It indicates that where a federal statute is directed at a specified class, "the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers within the affected class." *Ante*, at 104, n. 25. Assuming *arguendo* the existence of such a federal "best-plaintiff" rule, it is difficult to see why this rule would not altogether exclude taxpayers as plaintiffs under the Establishment Clause, since there plainly may be litigants under the Clause with the personal rights and interests of Hohfeldian plaintiffs. See, *e. g., Board of Education* v. *Allen*, decided today, *post*, p. 236.

[13] See, in particular, M. Howe, The Garden and the Wilderness 1–31 (1965); C. Antieau, A. Downey & E. Roberts, Freedom from Federal Establishment (1964). Not all members of the Court have of course ignored the complexities of the clause's history. See especially *McCollum* v. *Board of Education*, 333 U. S. 203, 238 (dissenting opinion of Reed, J.).

of the history of the Establishment Clause have found that "it is impossible to give a dogmatic interpretation of the First Amendment, and to state with any accuracy the intention of the men who framed it . . . ." [14] Above all, the evidence seems clear that the First Amendment was not intended simply to enact the terms of Madison's Memorial and Remonstrance against Religious Assessments.[15] I do not suggest that history is without relevance to these questions, or that the use of federal funds for religious purposes was not a form of establishment that many in the 18th century would have found objectionable. I say simply that, given the ultimate obscurity of the Establishment Clause's historical purposes, it is inappropriate for this Court to draw fundamental distinctions among the several constitutional commands upon the supposed authority of isolated dicta extracted from the clause's complex history. In particular, I have not found, and the opinion of the Court has not adduced, historical evidence that properly permits the Court to distinguish, as it has here, among the Establishment Clause, the Tenth Amendment, and the Due Process Clause of the Fifth Amendment as limitations upon Congress' taxing and spending powers.[16]

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[14] Antieau, Downey & Roberts, *supra*, at 142. See also Howe, *supra*, at 10–12.

[15] See, in particular, Antieau, Downey & Roberts, *supra*, at 126–128, 144–146, 207–208. And see 1 Annals of Cong. 730–731. It has elsewhere been observed, I think properly, that "to treat [Madison's Remonstrance] as authoritatively incorporated in the First Amendment is to take grotesque liberties with the simple legislative process, and even more with the complex and diffuse process of ratification of an Amendment by three-fourths of the states." Brown, Quis Custodiet Ipsos Custodes?—The School-Prayer Cases, 1963 Sup. Ct. Rev. 1, 8.

[16] I will of course grant that claims under, for example, the Tenth Amendment may present "generalized grievances about the conduct of government or the allocation of power in the Federal System." *Ante*, at 106. I will also grant that it would be well if

The Court's position is equally precarious if it is assumed that its premise is that the Establishment Clause is in some uncertain fashion a more "specific" limitation upon Congress' powers than are the various other constitutional commands. It is obvious, first, that only in some Pickwickian sense are any of the provisions with which the Court is concerned "specific[ally]" limitations upon spending, for they contain nothing that is expressly directed at the expenditure of public funds. The specificity to which the Court repeatedly refers must therefore arise, not from the provisions' language, but from something implicit in their purposes. But this Court has often emphasized that Congress' powers to spend are coterminous with the purposes for which, and methods by which, it may act, and that the various constitutional commands applicable to the central government, including those implicit both in the Tenth Amendment and in the General Welfare Clause, thus operate as limitations upon spending. See *United States* v. *Butler,* 297 U. S. 1. And see, *e. g., Veazie Bank* v. *Fenno,* 8 Wall. 533, 541; *Loan Association* v. *Topeka,* 20 Wall. 655, 664; *Thompson* v. *Consolidated Gas Co.,* 300 U. S. 55, 80; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495; *Everson* v. *Board of Education,* 330 U. S. 1, 6. Compare *Steward Machine Co.* v. *Davis,* 301 U. S. 548; *Helvering* v. *Davis,* 301 U. S. 619. I can attach no constitutional significance to the various degrees of specificity with which these limitations appear in the terms or history of the Constitution. If the Court accepts the proposition, as I do,

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such questions could be avoided by the federal courts. Unfortunately, I cannot see how these considerations are relevant under the Court's principal criterion, which I understand to be merely whether any given constitutional provision is, or is not, a limitation upon Congress' spending powers. It is difficult to see what there is in the fact that a constitutional provision is held to be such a limitation that could sensibly give the Court "confidence" about the fashion in which a given plaintiff will present a given issue.

that the number and scope of public actions should be restricted, there are, as I shall show, methods more appropriate, and more nearly permanent, than the creation of an amorphous category of constitutional provisions that the Court has deemed, without adequate foundation, "specific limitations" upon Congress' spending powers.

Even if it is assumed that such distinctions may properly be drawn, it does not follow that federal taxpayers hold any "personal constitutional right" such that they may each contest the validity under the Establishment Clause of all federal expenditures. The difficulty, with which the Court never comes to grips, is that taxpayers' suits under the Establishment Clause are not in these circumstances meaningfully different from other public actions. If this case involved a tax specifically designed for the support of religion, as was the Virginia tax opposed by Madison in his Memorial and Remonstrance,[17] I would agree that taxpayers have rights under the religious clauses of the First Amendment that would permit them standing to challenge the tax's validity in the federal courts. But this is not such a case, and appellants challenge an expenditure, not a tax. Where no such tax is involved, a taxpayer's complaint can consist only of an allegation that public funds have been, or shortly will be, expended for purposes inconsistent with the Constitution. The taxpayer cannot ask the return of any portion of his previous tax payments, cannot prevent the collection of any existing tax debt, and cannot demand an adjudication of the propriety of any particular level of taxation. His tax payments are received for the general purposes of the United States, and are, upon proper receipt, lost in the general revenues. Compare *Steward Machine Co.* v. *Davis, supra,* at 585. The interests he

[17] The bill was intended to establish "a provision for teachers of the Christian religion." It and the Memorial and Remonstrance are reprinted in *Everson* v. *Board of Education, supra,* at 63–74.

represents, and the rights he espouses, are, as they are in all public actions, those held in common by all citizens. To describe those rights and interests as personal, and to intimate that they are in some unspecified fashion to be differentiated from those of the general public, reduces constitutional standing to a word game played by secret rules.[18]

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[18] I have equal difficulty with the argument that the religious clauses of the First Amendment create a "personal constitutional right," held by all *citizens*, such that any *citizen* may, under those clauses, contest the constitutionality of federal expenditures. The essence of the argument would presumably be that freedom from establishment is a right that inheres in every citizen, thus any citizen should be permitted to challenge any measure that conceivably involves establishment. Certain provisions of the Constitution, so the argument would run, create the basic structure of our society and of its government, and accordingly should be enforceable at the demand of every individual. Unlike the position taken today by the Court, such a doctrine of standing would at least be internally consistent, but it would also threaten the proper functioning both of the federal courts and of the principle of separation of powers. The Establishment Clause is, after all, only one of many provisions of the Constitution that might be characterized in this fashion. Certain of these provisions, *e. g.*, the Ninth and Tenth Amendments, would provide the basis for cases that, absent a standing question, could not readily be excluded from the federal courts as involving political questions, or as otherwise unsuitable for adjudication under the principles formulated for these purposes by the Court. Compare *United Public Workers* v. *Mitchell*, 330 U. S. 75, 94–96; *Griswold* v. *Connecticut*, 381 U. S. 479. Indeed, it might even be urged that the Ninth and Tenth Amendments, since they are largely confirmatory of rights created elsewhere in the Constitution, were intended to declare the standing of individual citizens to contest the validity of governmental activities. It may, of course, also be argued that these amendments are merely "tub[s] for the whale," 1 W. Crosskey, Politics and the Constitution 688 (1953); but lacking such an argument, any doctrine of standing premised upon the generality or relative importance of a constitutional command would, I think, very substantially increase the number of situa-

Apparently the Court, having successfully circumnavigated the issue, has merely returned to the proposition from which it began. A litigant, it seems, will have standing if he is "deemed" to have the requisite interest, and "if you . . . have standing, then you can be confident you are" suitably interested. Brown, Quis Custodiet Ipsos Custodes?—The School-Prayer Cases, 1963 Sup. Ct. Rev. 1, 22.

III.

It seems to me clear that public actions, whatever the constitutional provisions on which they are premised, may involve important hazards for the continued effectiveness of the federal judiciary. Although I believe such actions to be within the jurisdiction conferred upon the federal courts by Article III of the Constitution, there surely can be little doubt that they strain the judicial function and press to the limit judicial authority. There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government. It is not, I submit, enough to say that the present members of the Court would not seize these opportunities for abuse, for such actions would, even without conscious abuse, go far toward the final transformation of this Court into the Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention.[19] I do not doubt that there must be "some effectual power in the government to restrain or correct the infractions" [20] of

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tions in which individual citizens could present for adjudication "generalized grievances about the conduct of government." I take it that the Court, apart from my Brother DOUGLAS, and I are agreed that any such consequence would be exceedingly undesirable.

[19] See 1 M. Farrand, The Records of the Federal Convention of 1787, at 21, 97–98, 108–110, 138–140 (1911); 2 Farrand, *id.*, at 73–80.

[20] The Federalist No. 80 (Hamilton).

the Constitution's several commands, but neither can I suppose that such power resides only in the federal courts. We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government "are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas R. Co.* v. *May,* 194 U. S. 267, 270. The powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government.

Presumably the Court recognizes at least certain of these hazards, else it would not have troubled to impose limitations upon the situations in which, and purposes for which, such suits may be brought. Nonetheless, the limitations adopted by the Court are, as I have endeavored to indicate, wholly untenable. This is the more unfortunate because there is available a resolution of this problem that entirely satisfies the demands of the principle of separation of powers. This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits. See especially *Oklahoma* v. *Civil Service Comm'n,* 330 U. S. 127, 137–139. Compare *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125–127. I would adhere to that principle.[21] Any hazards to the

[21] My premise is, as I have suggested, that non-Hohfeldian plaintiffs as such are not excluded by Article III from the jurisdiction of the federal courts. The problem is therefore to determine in what situations their suits should be permitted, and not whether a "statute constitutionally could authorize a person who shows no case or controversy to call on the courts . . . ." *Scripps-Howard Radio* v. *Comm'n,* 316 U. S. 4, 21 (dissenting opinion). I do not, of course, suggest that Congress' power to authorize suits by

proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President. I appreciate that this Court does not ordinarily await the mandate of other branches of the Government, but it seems to me that the extraordinary character of public actions, and of the mischievous, if not dangerous, consequences they involve for the proper functioning of our constitutional system, and in particular of the federal courts, makes such judicial forbearance the part of wisdom.[22] It must be emphasized

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specified classes of litigants is without constitutional limitation. This Court has recognized a panoply of restrictions upon the actions that may properly be brought in federal courts, or reviewed by this Court after decision in state courts. It is enough now to emphasize that I would not abrogate these restrictions in situations in which Congress has authorized a suit. The difficult case of *Muskrat* v. *United States*, 219 U. S. 346, does not require more. Whatever the other implications of that case, it is enough to note that there the United States, as statutory defendant, evidently had "no interest adverse to the claimants." *Id.*, at 361.

[22] I am aware that there is a second category of cases in which the Court has entertained claims by non-Hohfeldian plaintiffs: suits brought by state or local taxpayers in state courts to vindicate federal constitutional claims. A certain anomaly may be thought to have resulted from the Court's consideration of such cases while it has refused similar suits brought by federal taxpayers in the federal courts. This anomaly, if such it is, will presumably continue even under the standing doctrine announced today, since we are not told that the standing rules will hereafter be identical for the two classes of taxpayers. Although these questions are not now before the Court, I think it appropriate to note that one possible solution would be to hold that standing to raise federal questions is itself a federal question. See Freund, in E. Cahn, Supreme Court and Supreme Law 35 (1954). This would demand partial reconsideration of, for example, *Doremus* v. *Board of Education*, 342 U. S. 429. Cf. *United States* v. *Raines*, 362 U. S. 17, 23, n. 3; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 282; *Baker* v. *Carr*, 369 U. S. 186, 204.

that the implications of these questions of judicial policy are of fundamental significance for the other branches of the Federal Government.

Such a rule could readily be applied to this case. Although various efforts have been made in Congress to authorize public actions to contest the validity of federal expenditures in aid of religiously affiliated schools and other institutions, no such authorization has yet been given.[23]

This does not mean that we would, under such a rule, be enabled to avoid our constitutional responsibilities, or that we would confine to limbo the First Amendment or any other constitutional command. The question here is not, despite the Court's unarticulated premise, whether the religious clauses of the First Amendment are hereafter to be enforced by the federal courts; the issue is simply whether plaintiffs of an *additional* category, heretofore excluded from those courts, are to be permitted to maintain suits. The recent history of this Court is replete with illustrations, including even one announced today (*supra,* at n. 12), that questions involving the religious clauses will not, if federal taxpayers are prevented from contesting federal expenditures, be left "unacknowledged, unresolved, and undecided."

Accordingly, for the reasons contained in this opinion, I would affirm the judgment of the District Court.

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[23] This question was, however, extensively discussed in the course of the debates upon the Elementary and Secondary Education Act of 1965, 79 Stat. 27. See, *e. g.,* 111 Cong. Rec. 5973, 6132, 7316–7318.

PERMA LIFE MUFFLERS, INC., ET AL. *v.* INTERNATIONAL PARTS CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 733. Argued April 22–23, 1968.—Decided June 10, 1968.

Petitioners, dealers who had operated "Midas Muffler Shops," brought this antitrust action for treble damages against respondent Midas, Inc., its parent corporation (International), two other subsidiaries, and corporate officers and agents, charging an illegal conspiracy in violation of § 1 of the Sherman Act, and violations of § 3 of the Clayton Act and § 2 as amended by the Robinson-Patman Act. Petitioners attacked provisions of the sales agreements which they had made with Midas including those which barred petitioners from purchasing from other sources, prevented them from selling outside designated territories, tied muffler sales to other Midas-line products, and required petitioners to sell at fixed retail prices. The District Court entered summary judgment for respondents. The Court of Appeals reversed the judgment on the Robinson-Patman claim but affirmed the District Court's ruling that petitioners' other claims were barred by the doctrine of *in pari delicto*, noting that petitioners, with full knowledge of the restrictions, had enthusiastically sought and enormously profited from the Midas franchises and had sought additional franchises. The court also held that petitioners' Sherman Act claim was barred because Midas and International were part of a single business entity and therefore entitled to cooperate without creating an illegal conspiracy. *Held:*

1. There is nothing in the language of the antitrust laws indicating a congressional intent that the doctrine of *in pari delicto* should constitute a defense to a private antitrust action, and such application of the doctrine would undermine the important function performed by the private antitrust action in enforcing the antitrust laws. Pp. 138–140.

2. The record refutes respondents' argument that petitioners actively participated in formulating the restrictive plan and encouraged its continuation. Pp. 140–141.

3. Common ownership does not relieve separate corporate entities of the obligations which the antitrust laws impose; and in any

event each petitioner can charge a combination between Midas and himself or other acquiescing franchisees. Pp. 141–142.

376 F. 2d 692, reversed and remanded.

Robert F. Rolnick argued the cause for petitioners. With him on the briefs were *Raymond R. Dickey* and *Bernard Gordon.*

Glenn W. McGee argued the cause for respondents. With him on the brief were *John T. Chadwell, David J. Gibbons, John C. Berghoff, Jr., David Silbert,* and *Jay Erens.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The principal question presented is whether the plaintiffs in this private antitrust action were barred from recovery by a doctrine known by the Latin phrase *in pari delicto,* which literally means "of equal fault." The plaintiffs, petitioners here, were all dealers who had operated "Midas Muffler Shops" under sales agreements granted by respondent Midas, Inc. Their complaint charged that Midas had entered into a conspiracy with the other named defendants—its parent corporation International Parts Corp., two other subsidiaries, and six individual defendants who were officers or agents of the corporations—to restrain and substantially lessen competition in violation of § 1 of the Sherman Act [1] and § 3 of the Clayton Act.[2] They also charged that the defendants had violated § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act,[3] by granting discriminations in prices and services to some of their customers without offering the same advantages to the plaintiffs. The District Court entered summary judgment for respondents with respect to all of petitioners'

[1] 26 Stat. 209, 15 U. S. C. § 1.

[2] 38 Stat. 731, 15 U. S. C. § 14.

[3] 49 Stat. 1526, 15 U. S. C. § 13.

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claims. On appeal the Court of Appeals reversed the judgment for respondents on the Robinson-Patman claim but, over Judge Cummings' dissent, affirmed the District Court's ruling that the other claims were barred by the doctine of *in pari delicto*. The court also held that petitioners' Sherman Act claim was barred because Midas and International, while functioning as separate corporations, had a common ownership and therefore could cooperate without creating an illegal conspiracy.[4] 376 F. 2d 692 (1967). Because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari. 389 U. S. 1034 (1968). For reasons to be stated, we reverse.

The economic arrangements that led to this lawsuit have a long history. Respondent International Parts has been in the business of manufacturing automobile mufflers and other exhaust system parts since 1938. In 1955 the owners of International initiated a detailed plan for promoting the sale of mufflers by extensively advertising the "Midas" trade name and establishing a nationwide chain of dealers who would specialize in selling exhaust system equipment. Each prospective dealer was offered a sales agreement prepared by Midas, Inc., a wholly owned subsidiary of International. The agree-

[4] In their motion for summary judgment respondents also argued that the restraints were permissible as reasonable means to protect their registered trade and service marks, but because they had failed to answer interrogatories pertinent to this defense, the district judge ordered it stricken, without prejudice to renewal if respondents promptly answered the relevant interrogatories. Because of its disposition of the case, the Court of Appeals reached neither the merits of this defense nor the question whether respondents had ever properly renewed it. In the circumstances of this case, we think the merits of this defense cannot be decided as a summary judgment question but must be resolved, along with all the other issues, by a trial on the merits.

ment obligated the dealer to purchase all his mufflers from Midas, to honor the Midas guarantee on mufflers sold by any dealer, and to sell the mufflers at resale prices fixed by Midas and at locations specified in the agreement. The dealers were also obligated to purchase all their exhaust system parts from Midas, to carry the complete line of Midas products, and in general to refrain from dealing with any of Midas' competitors. In return Midas promised to underwrite the cost of the muffler guarantee and gave the dealer permission to use the registered trademark "Midas" and the service mark "Midas Muffler Shops." The dealer was also granted the exclusive right to sell "Midas" products within his defined territory. He was not required to pay a franchise fee or to purchase or lease substantial capital equipment from Midas, and the agreement was cancelable by either party on 30 days' notice.

Petitioners' complaint challenged as illegal restraints of trade numerous provisions of the agreements, such as the terms barring them from purchasing from other sources of supply, preventing them from selling outside the designated territory, tying the sale of mufflers to the sale of other products in the Midas line, and requiring them to sell at fixed retail prices. Petitioners alleged that they had often requested Midas to eliminate these restrictions but that Midas had refused and had threatened to terminate their agreements if they failed to comply. Finally they alleged that one of the plaintiffs had had his agreement canceled by Midas for purchasing exhaust parts from a Midas competitor, and that the other plaintiff dealers had themselves canceled their agreements. All the plaintiffs claimed treble damages for the monetary loss they had suffered from having to abide by the restrictive provisions.

The Court of Appeals, agreeing with the District Court, held the suit barred because petitioners were *in pari*

delicto. The court noted that each of the petitioners had enthusiastically sought to acquire a Midas franchise with full knowledge of these provisions and had "solemnly subscribed" to the agreement containing the restrictive terms. Petitioners had all made enormous profits as Midas dealers, had eagerly sought to acquire additional franchises, and had voluntarily entered into additional franchise agreements, all while fully aware of the restrictions they now challenge. Under these circumstances, the Court of Appeals concluded, "[i]t would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine." 376 F. 2d, at 699.

We find ourselves in complete disagreement with the Court of Appeals. There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble-damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist. Although *in pari delicto* literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. It was for this reason that we held in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951), that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation. Similarly, in *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that ex-

tent become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart, supra.*

In light of these considerations, we cannot accept the Court of Appeals' idea that courts have power to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others. Although petitioners may be subject to some criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them. Petitioners apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity. The argument that such

conduct by petitioners defeats their right to sue is completely refuted by the following statement from *Simpson:* "The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the anti-trust laws." 377 U. S., at 16. Moreover, even if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business. The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages, but once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right to recover which the antitrust acts give him. We therefore hold that the doctrine of *in pari delicto,* with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

Respondents, however, seek to support the judgment below on a considerably narrower ground. They picture petitioners as actively supporting the entire restrictive program as such, participating in its formulation and encouraging its continuation. We need not decide, however, whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto,* for barring a plaintiff's cause of action, for in the present case the factual picture respondents attempt to paint is utterly refuted by the record. One of the restrictions which petitioners most strenuously challenge is the requirement that dealers purchase their supplies exclusively from Midas. Another is the requirement that dealers carry Midas' full line of parts. Neither of these provisions could be in a dealer's self-interest since they obligate

him to buy from Midas regardless of whether more favorable prices can be obtained from other sources of supply and regardless of whether he needs certain parts at all.[5] In addition, the depositions refer to numerous instances in which petitioners asked Midas for permission to purchase from some other source of supply. The record shows that these requests were repeatedly refused by Midas representatives, who underscored the refusals by describing the very requests as "heresy" and by commenting that dealers who bought from outside sources of supply were "asking for trouble" or "were going to be punished." A Midas official warned petitioner Pierce, who had been buying some exhaust parts from other manufacturers, "Joe, this is just like cheating on your wife; it is grounds for divorce."

These statements completely refute respondents' argument that petitioners were active participants and show, to the contrary, that the illegal scheme was thrust upon them by Midas.

There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not

[5] Respondents suggest that these requirements were beneficial to a dealer because they helped him win customers who had confidence in the "Midas" brand, and some dealers evidently did try to reap some benefit from these requirements by advertising, "You get only nationally-advertised Midas products." It seems highly unlikely, however, that benefits of this kind could do more than mitigate very slightly the losses that a dealer would suffer when forced to buy higher-priced Midas products, particularly since dealers would have bought the higher-priced Midas products voluntarily if they thought customer preferences for the brand would be sufficiently strong to offset the higher price.

save them from any of the obligations that the law imposes on separate entities. See *Timken Co.* v. *United States*, 341 U. S. 593, 598 (1951); *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227 (1947). In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, *Albrecht* v. *Herald Co.*, 390 U. S. 145, 150, n. 6 (1968); *Simpson* v. *Union Oil Co., supra,* or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by "the communicated danger of termination," *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 372 (1967); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960). Although respondents object that these particular theories of conspiracy now pressed by petitioners were not alleged with sufficient specificity in their complaint, this suggestion is completely without merit. Our modern rules provide for trying cases to serve the ends of justice and require that pleadings "be so construed as to do substantial justice." Rule 8 (f), Fed. Rules Civ. Proc. The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy.

It follows that the judgment of the Court of Appeals must be reversed. The case is remanded to that court with directions to reverse in full the judgment of the District Court and to remand the case for trial.

It is so ordered.

MR. JUSTICE WHITE, concurring.

I join the opinion and judgment of the Court with the following observations.

As long ago as 1927, in *Eastman Kodak Co. of N. Y.* v. *Southern Photo Materials Co.*, 273 U. S. 359, the Court

recognized that participation in an unlawful course of conduct would not bar recovery where the defendant's superior bargaining power led to plaintiff's participation in the unlawful arrangement. In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), where plaintiff was said to have participated in an illegal scheme other than the one charged in his complaint, the Court made it clear that a plaintiff's own delinquency under the antitrust laws would not always bar his treble-damage suit. See also *Bales* v. *Kansas City Star Co.*, 336 F. 2d 439, 444 (C. A. 8th Cir. 1964); *Jewel Tea Co.* v. *Local Unions*, 274 F. 2d 217, 223 (C. A. 7th Cir.), cert. denied, 362 U. S. 936 (1960). These cases are enough to warrant reversal in this case, once it is concluded that the illegal arrangement in which petitioners participated was thrust on them by respondents. This is the conclusion reached by the Court and I agree with it.

I also agree that the *in pari delicto* defense in its historic formulation is not a useful concept for sorting out those situations in which the plaintiff might be barred because of his own conduct from those in which he may have been a party to an illegal venture but is still entitled to damages from other participants. Judgments like these would be better made by hewing closer to the aims and purposes of § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, which gives treble-damage recovery to the private plaintiff injured by conduct which violates the antitrust laws.

Under § 4, plaintiff must show not only that the defendant violated the antitrust laws but that his conduct caused the damages alleged in the complaint. Normally, it would be enough with respect to causation if the defendant "materially contributed" to plaintiff's injury, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 702 (1962); or "substantially

contributed, notwithstanding other factors contributed also," *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37, 43 (C. A. 1st Cir. 1948), cert. denied, 336 U. S. 967 (1949). The plaintiff need not show that the illegality was a more substantial cause than any other. *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F. 2d 798, 805–806 (C. A. 1st Cir.), cert. denied, 379 U. S. 931 (1964).

Under this rule, a third party proving an illegal undertaking between two defendants may recover for all damages caused by the combination. Those damages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with the violation; some degree of participation by both is essential to create a combination within the reach of § 1 of the Sherman Act. Either defendant is therefore deemed to have been a material cause of the damages, sufficient to permit a third party to recover.

This may be the result required under § 4 when conspirators are sued by an injured outsider. But what is the situation when one party to the combination sues the other? Assume three situations: first, A, a manufacturer, sells to B, a retailer. A, over B's objection, insists on B's adhering to specified resale prices. B agrees since A's product is an important part of his business and he can get it nowhere else. B suffers a decline in business because of an inability to match or better the price for competing products. B sues A. He is obviously in a position to prove that A was a substantial cause of his injury.

Second, suppose that when B maintains the suggested prices on A's product, he simply sells more of C's competing product, which he also handles. B is not hurt, but A is. A sues B.

Third, suppose that D and E, competitors, combine to fix higher prices. D's best customer sets up his own source of supply to D's great damage. D sues E, claiming that E was a substantial cause of his injury.

It is arguable that in each supposed situation recovery should be denied because the plaintiff was a party to the illegality and wrongdoers should be left where they are found. In terms of the deterrent aims of the statute permitting injured plaintiffs to recover treble damages, however, this undiscriminating approach makes little sense. When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of § 4, since it will deter those most likely to be responsible for organizing forbidden schemes. The principles of *Eastman Kodak Co. of N. Y.* v. *Southern Photo Materials Co., supra,* clearly permit recovery by the less responsible, but injured, party. In the first hypothetical case, therefore, B should recover from A in order to deter A and others like him from imposing resale price maintenance schemes on their customers.

In the second case, where manufacturer A, contrary to his expectations, was injured and retailer B was not, there is no reason, based on the deterrent purposes of § 4, to permit recovery from B, even though his cooperation was essential to the combination and even though had a third party been injured he could have recovered from either A or B, or from both. A, the moving force, should not be rewarded for his efforts to further an unlawful price arrangement and in effect to take from B the profits, trebled, that B made by selling the products of A's competitor. B was unwilling to enter the illegal scheme, was motivated principally by what he thought was economic necessity—the need to avoid losing business by being unable to offer a major

product line—and would have been only marginally deterred by the prospect of antitrust liability.

In the third case, where D and E are competitors, if D simply proves the agreement and the resulting loss, should he recover from E, absent some believable showing that E was the more responsible for the illegal scheme? No doubt E was a substantial factor in the combination and hence in the injury; a judgment for damages might deter him and others from violating the law. But D is equally responsible for his own damages. To permit him a recovery may be a counter-deterrent. By assuring him illegal profits if the agreement in restraint of trade succeeds, and treble damages if it fails, it may encourage what the Act was designed to prevent. In this situation, it is doubtful that the ends of § 4 would be measurably served by permitting D's recovery. If judge or jury finds the parties equally responsible for the conduct which caused injury, D's recovery under § 4 should be denied for failure of proof that E was the more substantial cause of the injury.

No simple formula can encompass the infinite variety of possible situations. Generally speaking, however, I would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them but permit recovery in favor of the one less responsible where one is more responsible than the other. This rule would simply pose the issue of causation in particularized form. There will be little mystery as to what evidence would be relevant proof: facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal under § 1; proof of whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing

who ultimately profited or suffered from the arrangement.

As I view the record in the case before us, the evidence is insufficient to show that petitioners were as responsible as respondents, or more so, for the admittedly illegal scheme. The evidence before us does not suggest that petitioners were equal partners with respondents with respect to the origin and implementation of this scheme for distributing respondents' mufflers, or in terms of benefits from the scheme. In such circumstances summary judgment for respondents was improper.

MR. JUSTICE FORTAS, concurring in the result.

I agree with the result in this case. Petitioners' right to recover in their own interest and as "private attorneys general" to enforce the antitrust laws cannot be denied on the basis of the doctrine of *in pari delicto*. *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964).

The doctrine has, however, a significant if limited role in private antitrust law. If the fault of the parties is reasonably within the same scale—if the *"delictum"* is approximately *"par"*—then the doctrine should bar recovery. This might be the case, for example, if a manufacturer of mufflers and a manufacturer of other parts had combined to formulate and operate a collusive scheme. One co-adventurer could not sue the other for discriminatory or restrictive practices which allegedly diminished its take from the enterprise.

But equality of position of this general nature is necessary before *in pari delicto* may apply to bar an antitrust remedy. Unless the doctrine is so limited, the private remedy provided by the antitrust laws is nullified to a significant extent. The owner of a gas station may enter into an arrangement with the distributor and may benefit from its restrictive provisions. But this less-than-equal participation in the crime must not bar him

from recovering in his own and the public interest if he can show that he has suffered compensable harm. Our decision in *Simpson* indicates this quite clearly. The antitrust laws are intended to protect individuals "from combinations fashioned by others and offered to [them] . . . as the only feasible method by which [they] may do business." *Ring* v. *Spina*, 148 F. 2d 647, 653 (1945).

As the Court points out, it is possible that the franchisee may be proved to be a collaborator, or co-adventurer, or a true *particeps criminis* with respect *to a particular aspect* of the plan—for example, if he *originated and insisted* upon the inclusion of a territorial exclusivity clause which was not in the franchise as drafted by the franchisor. He could not recover damages based upon this, if, essentially, it is his own act.

Clearly, petitioners here are not co-adventurers or partners in the franchise arrangement as a whole, and they are not barred by *in pari delicto*. On remand, as the Court orders, if petitioners are chargeable with responsibility for a particular clause of the agreement or restrictive covenant because it is, in substance, their own act, they should not be allowed to recover for injury they may have suffered because of it.

MR. JUSTICE MARSHALL, concurring in the result.

While I agree with the result and much of the reasoning in the opinion of the Court in this case, I find myself unable to accept what I take to be the holding that the doctrine of *in pari delicto* has no place in a treble-damage antitrust action. Not only is it unnecessary to pass on such a broad proposition on the facts of this case, as the Court's opinion reveals, but the holding itself is, in my opinion, incorrect.

I agree that the "complex scope, contents, and effects" of the doctrine as it has grown up in the common law should not be applied mechanically to private antitrust

actions under the relevant federal statutes. On the other hand, I believe that a limited application of the basic principle behind the doctrine of *in pari delicto* is both proper and desirable in the antitrust field. As the Court notes, *ante,* at 138, the literal meaning of *in pari delicto* is of equal fault. I would hold that where a defendant in a private antitrust suit can show that the plaintiff actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault, the plaintiff should be barred from imposing liability on the defendant.

Such an approach would still require reversal of the decision of the Court of Appeals in this case. As this Court's opinion makes perfectly clear, the mere fact that a party enters into an agreement containing provisions that are violative of the antitrust laws with the intent to make money by operating under the agreement is not in itself sufficient to show that he is equally responsible for the existence of the illegal provisions. *Simpson* v. *Union Oil Co.,* 377 U. S. 13 (1964). Furthermore, the Court is certainly correct in concluding that the record is replete with evidence, relating to the tying and exclusive-dealing provisions of the franchise agreement, which indicates, with sufficient probative force to withstand respondents' motion for summary judgment, that the petitioners did not actively seek out or support all the anticompetitive restraints embodied in the franchise.

However, the inquiry should not stop here. The franchise agreement also contains provisions requiring both resale price maintenance and the observance of territorial restrictions on sales by franchisees. Both of these sets of restrictions are ones which, at least on their face, would ordinarily be expected to benefit the franchisees more than Midas. Both restrict competition between franchisees, not between Midas and other suppliers competing to sell parts to Midas franchisees. If Midas can

make an adequate showing that those provisions were inserted into the franchise agreement at the behest and for the benefit of petitioners and their fellow franchisees, petitioners should, in my opinion, be barred from contending that they were damaged by the existence and enforcement of the provisions.

I agree with the Court that petitioners should not be barred from recovering damages attributable to the enforcement of the tying and exclusive dealing provisions against them on the sole ground that they participated in the formulation of other anticompetitive provisions in the agreement. Cf. *Moore* v. *Mead Service Co.*, 340 U. S. 944 (1951), vacating 184 F. 2d 338 (C. A. 10th Cir. 1950). However, if Midas could show, which it has quite clearly not done at this stage of the litigation, that petitioners actually participated in the formulation of the entire agreement, trading off anticompetitive restraints on their own freedom of action (such as the tying and exclusive dealing provisions) for anticompetitive restraints intended for their benefit (such as resale price maintenance or exclusive territories), petitioners should be barred from seeking damages as to the agreement as a whole.

It may be argued that the course I propose unduly complicates private antitrust litigation. A holding that a party who voluntarily enters into an agreement containing provisions that violate the antitrust laws is barred from any recovery on that agreement altogether (as the Court of Appeals has held here) or, at the other extreme, is absolutely free to recover any damages that he can show to stem from his operations under the agreement (as this Court's opinion seems to hold) would presumably be considerably easier to apply in most cases. It seems to me, however, that neither holding would represent a satisfactory resolution of the difficult problems concerning the administration of the antitrust laws raised by

agreements such as the one involved in the present case.

The reasons for rejecting the approach taken by the Court of Appeals are, as I have said, persuasively set forth in the opinion of the Court. The reasons I see for rejecting the approach taken by this Court are, perhaps, less related to the public interest in eliminating all forms of anticompetitive business conduct and more related to the equities as between the parties. The principle that a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental in our jurisprudence. The traditional doctrine of *in pari delicto* is itself firmly based on this principle. I nevertheless agree, because of the strong public interest in eliminating restraints on competition, that many of the refinements of moral worth demanded of plaintiffs by such traditional legal and equitable doctrines as *volenti non fit injuria,* unclean hands, and many of the variations of *in pari delicto* should not be applicable in the antitrust field. However, I cannot agree that the public interest requires that a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit be permitted to demand redress—in the form of treble damages—from a partner who is no more responsible for the existence of the illegality than the plaintiff.

The possible added deterrence to violations of the antitrust laws that would be produced by the Court's holding may well be equaled, if not surpassed, by the new incentive it will create to commit such violations, for a potential violator will have less to lose if he can attempt to recover his losses from his partner should the scheme not work out to his benefit.

The Court's opinion appears to seek to minimize the consequences of doing away with the *in pari delicto* defense by suggesting that a defendant will be able to have the "beneficial byproducts of a restriction" (*ante,* at 140) to the plaintiff taken into account in the compu-

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tation of damages. This, of course, is to some extent already true in any antitrust case. Illegal conduct does not *per se* result in a money judgment for a plaintiff; injury must always be shown. However, a defendant might also be permitted to show that the plaintiff's financial rewards from some of the illegal provisions of an agreement outweighed the harm suffered from other illegal provisions, and accordingly on some sort of offset theory the plaintiff would recover nothing.

If such an offset approach on the issue of damages is envisioned by the Court, it hardly seems an adequate means of preventing unjust enrichment. First, that approach clearly permits damages to be awarded when injury is shown to outweigh benefit regardless of the nature of the plaintiff's participation in the scheme. Second, it adds an unnecessarily speculative element to the factual inquiry required in an antitrust case. While a trier of fact may have some difficulty in allocating responsibility between the parties to an agreement, the allocation can be made for the most part on the basis of hard evidence as to the facts surrounding the making of the agreement. The determination of damages in an antitrust suit, however, almost invariably requires a certain amount of speculation, no matter how informed. Cf. *Bigelow* v. *RKO Pictures, Inc.*, 327 U. S. 251, 264–266 (1946). Such speculation is ordinarily unavoidable if damages are to be provable. Here there is no necessity for permitting additional speculation as to offsetting benefits in order to prevent unjust enrichment because the same goal can be achieved by a factual evaluation of the parties' respective fault.

For example, it is obviously much easier to determine in this case whether petitioners actively participated in the formulation and implementation of the various illegal provisions of the franchise agreement than it is to decide whether the monetary benefits that petitioners obtained

through the resale price maintenance and exclusive territorial provisions surpassed the losses they suffered from the exclusive dealing and tying arrangements. Since I regard a respective-fault approach as superior to a damage-offset approach on principle, the complications inherent in the latter inquiry merely reinforce my conviction that the Court is being unwise in broadly rejecting the doctrine of *in pari delicto*.

MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

The variety of views this case has engendered seems to me to stem from lack of agreement on a definition of the term "*in pari delicto*," as well as a disagreement, perhaps, on the standards that should govern the use of the defense to which that term is properly applied. I believe that the courts below misused the term, but that properly used it refers to a defense that should be permitted in antitrust cases. Consequently, I would remand this case not for immediate trial but for fresh consideration of the motion for summary judgment upon proper standards.

Plaintiffs who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant.[1] If the law is the Sherman Act, both are, in principle, liable equally to criminal prosecution. For example, two manufacturers who agree on a price at which they will sell are "of equal fault," as are a manufacturer and a dealer who strike a bargain whereby each accepts an illegal restriction that benefits the other.

[1] This is at least the traditional use of the term. See, *e. g.*, *Williams* v. *Hedley*, 8 East 378, 381–382, 103 Eng. Rep. 388, 389. See generally Note, In Pari Delicto and Consent as Defenses in Private Antitrust Suits, 78 Harv. L. Rev. 1241, distinguishing the two defenses. The present case is as good an illustration as any of the usefulness of maintaining distinct terms for the distinct situations properly characterized by "*in pari delicto*," "consent," "unclean hands," and so forth.

When a person suffers losses as a result of activities the law forbade *him* to engage in, I see no reason why the law should award him treble damages from his fellow offenders. It seems to me a bizarre way to "further the overriding public policy in favor of competition," *ante,* at 139, to pay violators three times their losses in doing what public policy seeks to deter them from doing. Even if the threat of intra-conspiracy treble damages had some deterrent effect, however, I should not think it a too "fastidious regard for the relative moral worth of the parties," *ibid.,* to decline to sanction a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves.

There are, however, three situations quite distinct from that to which I think the term *in pari delicto* is properly applied. The first is the "consent" situation in which the Latin maxim *"volenti non fit injuria"* is sometimes invoked. Where X and Y conspire to fix prices at which they will sell, they are *in pari delicto.* If Z, *knowing of the conspiracy,* nevertheless purchases from X, he is not *in pari delicto.* He has committed no offense: the most that can be said is that he knowingly allowed an offense to be committed against him. I would agree, for many of the reasons stated in the opinions of MR. JUSTICE BLACK, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL, that there should be no defense in such a situation, where the plaintiff has done nothing the law told him not to do.

A second situation distinguishable from true *in pari delicto* is illustrated by *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211, relied on by the Court. It was there alleged in defense to a treble-damage action that the defendants' illegal actions were taken in reprisal against altogether independent illegal actions by the plaintiff. Here again, I accept the decision that this is no defense. Our law frowns on vigilante justice. Since the plaintiff is in part enforcing the public interest against the defendants' violations, I would permit him to do so, and

leave punishment for any independent violation by him to proper means of enforcement.

The third distinguishable situation may or may not be illustrated by *Simpson* v. *Union Oil Co.*, 377 U. S. 13, and *Albrecht* v. *Herald Co.*, 390 U. S. 145, two cases that I find it quite difficult to understand.[2] In each of them, the plaintiff had been offered a dealership, on terms that he did not participate in formulating, and in each case he at first "accepted" such a dealership. Since neither case stated satisfactorily where the alleged combination in restraint of trade was to be found, it is not clear whether the plaintiff's acceptance of a dealership was itself a forbidden act. If it was not, then these cases fall under the heading of "consent" cases. A person who engaged in a lawful business on the terms offered should not be prevented from suing merely by his knowledge that others violated the law in contriving those terms. If, however, those plaintiffs were doing something the law told them not to do, I suggest that recovery in those cases can best be understood on the theory of a "coercion" exception to the *in pari delicto* doctrine. That is, although a large business with the power to dictate terms and a small business that can only accept them or cease doing business may both, in principle, be liable to legal sanctions for the contract that results from the offer and acceptance, it is considered that the liability is not *"par,"* and that the business accepting dictation is only minimally blameworthy.

In my view, the District Court and the Court of Appeals did not apply the true *in pari delicto* standard to this case. The District Court said that "each plaintiff voluntarily entered into the franchise agreement . . . and accepted the benefits therefrom. They are . . . [therefore?] *in pari delicto* with defendants . . . ."[3] At an-

[2] See my dissenting opinion in *Albrecht*, 390 U. S., at 156.

[3] 1966 Trade Cases ¶ 71,801, at 82,705.

other point the court said, "We have repeatedly held that a person who freely assents to an act suffers 'no legal injury' if harm results therefrom." [4] Although the District Court made a passing distinction of the "coercion" and "unclean hands" doctrines, it is not clear that it meant to hold that the violation of the Sherman Act, if any, was one for which plaintiffs were subject to public-law sanctions along with the defendants.

The Court of Appeals decision was similar. That court relied on the District Court's language quoted above, adding that each of the plaintiffs had made a substantial profit from selling auto parts, a fact that might bear on the measure of any damages but which, apart from illegal action on the part of the plaintiffs, should not afford an absolute defense.[5]

It is by no means clear on this record, however, that the plaintiffs may not be said to have been *in pari delicto* in the proper sense of that term. This question is rendered more difficult by the complexity of the record history of plaintiffs' activities, and by the formidable obscurity of the law of dealer liability for vertical restraints, an obscurity fostered by *Simpson, supra, Albrecht, supra,* and above all by *United States* v. *Parke, Davis & Co.*, 362 U. S. 29. Although I make no attempt to drain the bog at this point, I am of the view that before this case goes to trial the lower courts should be given another opportunity to consider the *in pari delicto* defense. I would remand this case to determine whether any agreement alleged to be in restraint of trade was one for which the plaintiffs were substantially as much responsible, and as much legally liable, as the defendants. I would permit the lower courts to consider this question upon the existing affidavits and such additional material as either side may wish to adduce.

[4] *Id.*, at 82,706.

[5] See 376 F. 2d 692, at 693, 695.

Syllabus.

UNITED STATES ET AL. *v.* SOUTHWESTERN CABLE CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 363. Argued March 12–13, 1968.—Decided June 10, 1968.*

Community antenna television (CATV) systems receive television broadcast signals, amplify them, transmit them by cable or microwave, and distribute them by wire to their subscribers' receivers. In 1959 the Federal Communications Commission (FCC), although it found CATV "related to interstate transmission," stated that it "did not intend to regulate CATV," and that it preferred to recommend legislation which would impose specified requirements upon CATV systems. Such legislation was proposed but not enacted. The CATV industry has had an explosive growth, has increased substantially the signal transmission range, and has been bringing signals from selected broadcasting areas into metropolitan centers. Since 1960 the FCC has gradually asserted jurisdiction over CATV, and in 1965, following hearings, the FCC issued revised rules, applicable to cable and microwave CATV systems, to govern the carriage of local signals and the nonduplication of local programming. The FCC banned CATV transmission of distant signals into the 100 largest television markets (except for such service as existed on February 15, 1966, or unless the FCC found the service would "be consistent with the public interest"), and created summary procedures for applications for separate or additional relief. Petitioner Midwest Television applied for special relief, alleging that respondents' CATV systems transmitted signals from Los Angeles into the San Diego area, adversely affecting Midwest's San Diego station. The FCC, after considering the petition and responsive pleadings, restricted the expansion of respondents' service in areas in which they had not operated on February 15, 1966, pending hearings on the merits of Midwest's complaint. The Court of Appeals held that the FCC lacked authority under the Communications Act of 1934 to issue such order. *Held:*

1. The FCC has authority under the Act to regulate CATV systems. Pp. 167–178.

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*Together with No. 428, *Midwest Television, Inc., et al.* v. *Southwestern Cable Co. et al.*, also on certiorari to the same court.

(a) The FCC has broad authority over "all interstate and foreign communication by wire or radio," which includes CATV systems as they are encompassed within the term "communication by wire or radio," and there is no doubt they are engaged in interstate communication. Pp. 167–169.

(b) The FCC's requests for legislation have no significant bearing on the resolution of this issue. Pp. 169–171.

(c) The FCC has reasonably found that the successful performance of its responsibilities for the orderly development of local television broadcasting demands prompt and efficacious regulation of CATV, and in the absence of compelling evidence that Congress intended otherwise, administrative action imperative for an agency's ultimate purposes should not be prohibited. *Permian Basin Area Rate Cases*, 390 U. S. 747, 780. Pp. 172–178.

(d) The FCC's authority recognized here is restricted to that reasonably ancillary to the effective performance of its responsibilities for the regulation of television broadcasting. P. 178.

2. The FCC had authority to issue the prohibitory order in this case. Pp. 178–181.

(a) The order was designed merely to preserve the situation as of the time of issuance, and it was not, in form or function, a cease-and-desist order that must issue under § 312 of the Act, and which requires a hearing or a waiver of the right thereto. Pp. 179–180.

(b) The FCC has authority to issue "such orders . . . as may be necessary in the execution of its functions," and this order for interim relief pending hearings to determine appropriate action, did not exceed or abuse its authority under the Act. Pp. 180–181.

378 F. 2d 118, reversed and remanded.

Henry Geller argued the cause for the United States et al. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Turner, Francis X. Beytagh, Jr., Howard E. Shapiro,* and *Daniel R. Ohlbaum.*

Ernest W. Jennes argued the cause for petitioners in No. 428. With him on the briefs was *Charles A. Miller.*

Arthur Scheiner argued the cause for respondent Southwestern Cable Co. in both cases. With him on the brief were *Morton H. Wilner* and *Harold F. Reis. Rob-*

ert L. Heald argued the cause for respondents Mission Cable TV, Inc., et al. in both cases. With him on the brief were *Frank U. Fletcher, Edward F. Kenehan,* and *James P. Riley.*

Michael Finkelstein filed a brief for the All-Channel Television Society, as *amicus curiae,* urging reversal.

Briefs of *amici curiae,* urging affirmance, were filed by *Robert A. Marmet, Thomas W. Wilson, John D. Matthews,* and *Robert H. Young* for the Alice Cable Television Corp. et al., and by *Wayne W. Owen, Harry M. Plotkin,* and *George H. Shapiro* for the Black Hills Video Corp. et al.

MR. JUSTICE HARLAN delivered the opinion of the Court.

These cases stem from proceedings conducted by the Federal Communications Commission after requests by Midwest Television [1] for relief under §§ 74.1107 [2] and

[1] Midwest's petition was premised upon its status as licensee of KFMB–TV, San Diego, California. It is evidently also the licensee of various other broadcasting stations. See Second Report and Order, 2 F. C. C. 2d 725, 739.

[2] 47 CFR § 74.1107 (a) provides that "[n]o CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year." San Diego is the Nation's 54th largest television market. *Midwest Television, Inc.,* 11 Pike & Fischer Radio Reg. 2d 273, 276.

74.1109[3] of the rules promulgated by the Commission for the regulation of community antenna television (CATV) systems. Midwest averred that respondents' CATV systems transmitted the signals of Los Angeles broadcasting stations into the San Diego area, and thereby had, inconsistently with the public interest, adversely affected Midwest's San Diego station.[4] Midwest sought an appropriate order limiting the carriage of such signals by respondents' systems. After consideration of the petition and of various responsive pleadings, the Commission restricted the expansion of respondents' service in areas in which they had not operated on February 15, 1966, pending hearings to be conducted on the merits of Midwest's complaints.[5] 4 F. C. C. 2d 612.

[3] 47 CFR § 74.1109 creates "procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes." It provides that petitions for special relief "may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted." 47 CFR § 74.1109 (b). Provisions are made for comments or opposition to the petition, and for rejoinders by the petitioner. 47 CFR §§ 74.1109 (d), (e). Finally, the Commission "may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate." 47 CFR § 74.1109 (f).

[4] Midwest asserted that respondents' importation of Los Angeles signals had fragmented the San Diego audience, that this would reduce the advertising revenues of local stations, and that the ultimate consequence would be to terminate or to curtail the services provided in the San Diego area by local broadcasting stations. Respondents' CATV systems now carry the signals of San Diego stations, but Midwest alleged that the quality of the signals, as they are carried by respondents, is materially degraded, and that this serves only to accentuate the fragmentation of the local audience.

[5] February 15, 1966, is the date on which grandfather rights accrued under 47 CFR § 74.1107 (d). The initial decision of the hearing examiner, issued October 3, 1967, concluded that permanent

On petitions for review, the Court of Appeals for the Ninth Circuit held that the Commission lacks authority under the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151, to issue such an order.[6] 378 F. 2d 118. We granted certiorari to consider this important question of regulatory authority.[7] 389 U. S. 911. For reasons that follow, we reverse.

I.

CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers.[8] CATV systems

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restrictions on the expansion of respondents' services were unwarranted. *Midwest Television, Inc.*, 11 Pike & Fischer Radio Reg. 2d 273. The Commission has declined to terminate its interim restrictions pending consideration by the Commission of the examiner's decision. *Midwest Television, Inc., id.*, at 721.

[6] The opinion of the Court of Appeals could be understood to hold either that the Commission may not, under the Communications Act, regulate CATV, or, more narrowly, that it may not issue the prohibitory order involved here. We take the court's opinion, in fact, to have encompassed both positions.

[7] We note that the Court of Appeals for the District of Columbia Circuit has concluded that the Communications Act permits the regulation of CATV systems. See *Buckeye Cablevision, Inc.* v. *F. C. C.*, 128 U. S. App. D. C. 262, 387 F. 2d 220.

[8] CATV systems are defined by the Commission for purposes of its rules as "any facility which . . . receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." 47 CFR § 74.1101 (a).

characteristically do not produce their own programming,[9] and do not recompense producers or broadcasters for use of the programming which they receive and redistribute.[10] Unlike ordinary broadcasting stations, CATV systems commonly charge their subscribers installation and other fees.[11]

The CATV industry has grown rapidly since the establishment of the first commercial system in 1950.[12] In the late 1950's, some 50 new systems were established each year; by 1959, there were 550 "nationally known and identified" systems serving a total audience of 1,500,000 to 2,000,000 persons.[13] It has been more recently estimated that "new systems are being founded at the rate of more than one per day, and . . . subscribers . . . signed on at the rate of 15,000 per month." [14] By late 1965, it was reported that there were 1,847 operating CATV systems, that 758 others were franchised but not yet in operation, and that there were 938 applications

[9] There is, however, no technical reason why they may not. See Note, The Wire Mire: The FCC and CATV, 79 Harv. L. Rev. 366, 367. Indeed, the examiner was informed in this case that respondent Mission Cable TV "intends to commence program origination in the near future." *Midwest Television, Inc., supra,* at 283.

[10] The question whether a CATV system infringes the copyright of a broadcasting station by its reception and retransmission of the station's signals is presented in *Fortnightly Corp.* v. *United Artists TV, Inc.,* No. 618, now pending before the Court. [REPORTER'S NOTE: See *post,* p. 390.]

[11] The installation costs for CATV systems in 16 Connecticut communities were, for example, found to range from $31 to $147 per home. M. Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry 24 (1965).

[12] CATV systems were evidently first established on a noncommercial basis in 1949. H. R. Rep. No. 1635, 89th Cong., 2d Sess., 5.

[13] CATV and TV Repeater Services, 26 F. C. C. 403, 408; Note, The Wire Mire: The FCC and CATV, *supra,* at 368.

[14] Note, The Wire Mire: The FCC and CATV, *supra,* at 368.

for additional franchises.[15] The statistical evidence is incomplete, but, as the Commission has observed, "whatever the estimate, CATV growth is clearly explosive in nature." Second Report and Order, 2 F. C. C. 2d 725, 738, n. 15.

CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals.[16] In 1959, only 50 systems employed microwave relays, and the maximum distance over which signals were transmitted was 300 miles; by 1964, 250 systems used microwave, and the transmission distances sometimes exceeded 665 miles. First Report and Order, 38 F. C. C. 683, 709. There are evidently now plans "to carry the programing of New York City independent stations by cable to . . . upstate New York, to Philadelphia, and even as far as Dayton." [17] And see *Chan-*

[15] Second Report and Order, 2 F. C. C. 2d 725, 738. The franchises are granted by state or local regulatory agencies. It was reported in 1965 that two States, Connecticut and Nevada, regulate CATV systems, and that some 86% of the systems are subject at least to some local regulation. Seiden, *supra*, at 44–47. See Conn. Gen. Stat. Rev., Tit. 16, c. 289 (1958); Nev. Stat. 1967, c. 458.

[16] The term "distant signal" has been given a specialized definition by the Commission, as a signal "which is extended or received beyond the Grade B contour of that station." 47 CFR § 74.1101 (i). The Grade B contour is a line along which good reception may be expected 90% of the time at 50% of the locations. See 47 CFR § 73.683 (a).

[17] Note, The Wire Mire: The FCC and CATV, *supra*, at 368 (notes omitted).

nel 9 Syracuse, Inc. v. *F. C. C.*, 128 U. S. App. D. C. 187, 385 F. 2d 969; *Hubbard Broadcasting, Inc.* v. *F. C. C.*, 128 U. S. App. D. C. 197, 385 F. 2d 979. Thus, "while the CATV industry originated in sparsely settled areas and areas of adverse terrain . . . it is now spreading to metropolitan centers . . . ." First Report and Order, *supra*, at 709. CATV systems, formerly no more than local auxiliaries to broadcasting, promise for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas throughout the country.[18]

The Commission has on various occasions attempted to assess the relationship between community antenna television systems and its conceded regulatory functions. In 1959, it completed an extended investigation of several auxiliary broadcasting services, including CATV. CATV and TV Repeater Services, 26 F. C. C. 403. Although it found that CATV is "related to interstate transmission," the Commission reasoned that CATV systems are neither common carriers nor broadcasters, and therefore are within neither of the principal regulatory categories created by the Communications Act. *Id.*, at 427–428. The Commission declared that it had not been given plenary authority over "any and all enterprises which happen to be connected with one of the many aspects of communications." *Id.*, at 429. It refused to premise regulation of CATV upon assertedly adverse consequences for broadcasting, because it could not "determine where the impact takes effect, although we recognize that it may well exist." *Id.*, at 431.

The Commission instead declared that it would forthwith seek appropriate legislation "to clarify the situa-

[18] It has thus been suggested that "a nationwide grid of wired CATV systems, interconnected by microwave frequencies and financed by subscriber fees, may one day offer a viable economic alternative to the advertiser-supported broadcast service." Levin, New Tech-

tion." *Id.*, at 438. Such legislation was introduced in the Senate in 1959,[19] favorably reported,[20] and debated on the Senate floor.[21] The bill was, however, ultimately returned to committee.[22]

Despite its inability to obtain amendatory legislation, the Commission has, since 1960, gradually asserted jurisdiction over CATV. It first placed restrictions upon the activities of common carrier microwave facilities that serve CATV systems. See *Carter Mountain Transmission Corp.*, 32 F. C. C. 459, aff'd, 321 F. 2d 359. Finally, the Commission in 1962 conducted a rule-making proceeding in which it re-evaluated the significance of CATV for its regulatory responsibilities. First Order and Report, *supra.* The proceeding was explicitly restricted to those systems that are served by microwave, but the Commission's conclusions plainly were more widely relevant. The Commission found that "the likelihood or probability of [CATV's] adverse impact upon potential and existing service has become too substantial to be dismissed." *Id.*, at 713–714. It reasoned that the importation of distant signals into the service areas of local stations necessarily creates "substantial competition" for local broadcasting. *Id.*, at 707. The Commission acknowledged that it could not "measure precisely the degree of . . . impact," but found that "CATV competition can have a substantial negative effect upon station audience and revenues . . . ." *Id.*, at 710–711.

The Commission attempted to "accommodat[e]" the

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nology and the Old Regulation in Radio Spectrum Management, 56 Am. Econ. Rev. 339, 341 (Proceedings, May 1966).

[19] See S. 2653, 86th Cong., 1st Sess.

[20] S. Rep. No. 923, 86th Cong., 1st Sess.

[21] See 106 Cong. Rec. 10416–10436, 10520–10548.

[22] *Id.*, at 10547. The Commission in 1966 made additional efforts to obtain suitable modifications in the Communications Act. See n. 30, *infra.*

interests of CATV and of local broadcasting by the imposition of two rules. *Id.*, at 713. First, CATV systems were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals.[23] Second, CATV systems were forbidden to duplicate the programming of such local stations for periods of 15 days before and after a local broadcast. See generally First Report and Order, *supra*, at 719–730. These carriage and nonduplication rules were expected to "insur[e] many stations' ability to maintain themselves as their areas' outlets for highly popular network and other programs . . . ." *Id.*, at 715.

The Commission in 1965 issued additional notices of inquiry and proposed rule-making, by which it sought to determine whether all forms of CATV, including those served only by cable, could properly be regulated under the Communications Act. 1 F. C. C. 2d 453. After further hearings, the Commission held that the Act confers adequate regulatory authority over all CATV systems. Second Report and Order, *supra*, at 728–734. It promulgated revised rules, applicable both to cable and to microwave CATV systems, to govern the carriage of local signals and the nonduplication of local programming. Further, the Commission forbade the importation by CATV of distant signals into the 100 largest television markets, except insofar as such service was offered on February 15, 1966, unless the Commission has previously

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[23] See generally First Report and Order, *supra*, at 716–719. The Commission held that a CATV system must, within the limits of its channel capacity, carry the signals of stations that place signals over the community served by the system. The stations are to be given priority according to the strength of the signal available in the community, with the strongest signals given first priority. Exceptions are made for situations in which there would be substantial duplication or in which an independent or noncommercial station would be excluded. *Id.*, at 717.

found that it "would be consistent with the public interest," *id.*, at 782; see generally *id.*, at 781–785, "particularly the establishment and healthy maintenance of television broadcast service in the area," 47 CFR § 74.1107 (c). Finally, the Commission created "summary, nonhearing procedures" for the disposition of applications for separate or additional relief. 2 F. C. C. 2d, at 764; 47 CFR § 74.1109. Thirteen days after the Commission's adoption of the Second Report, Midwest initiated these proceedings by the submission of its petition for special relief.

II.

We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court. The issues in these cases are only two: whether the Commission has authority under the Communications Act to regulate CATV systems, and, if it has, whether it has, in addition, authority to issue the prohibitory order here in question.[24]

The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio . . . ." 47 U. S. C. § 152 (a). The Commission's responsibilities are no more narrow: it is required to endeavor to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ." 47 U. S. C. § 151. The

[24] It must also be noted that the CATV systems involved in these cases evidently do not employ microwave. We intimate no views on what differences, if any, there might be in the scope of the Commission's authority over microwave and nonmicrowave systems.

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Commission was expected to serve as the "single Government agency" [25] with "unified jurisdiction" [26] and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." [27] It was for this purpose given "broad authority." [28] As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry." *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137.

Respondents do not suggest that CATV systems are not within the term "communication by wire or radio." Indeed, such communications are defined by the Act so as to encompass "the transmission of . . . signals, pictures, and sounds of all kinds," whether by radio or cable, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U. S. C. §§ 153 (a), (b). These very general terms amply suffice to reach respondents' activities.

Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the inter-

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[25] The phrase is taken from the message to Congress from President Roosevelt, dated February 26, 1934, in which he recommended the Commission's creation. See H. R. Rep. No. 1850, 73d Cong., 2d Sess., 1.

[26] S. Rep. No. 781, 73d Cong., 2d Sess., 1.

[27] *Ibid.* The Committee also indicated that there was a "vital need" for such a commission, with jurisdiction "over all of these methods of communication." *Ibid.*

[28] The phrase is taken from President Roosevelt's message to Congress. H. R. Rep. No. 1850, *supra*, at 1. The House Committee added that "the primary purpose of this bill [is] to create such a commission armed with adequate statutory powers to regulate all forms of communication . . . ." *Id.*, at 3.

cepted signals emanate from stations located within the same State in which the CATV system operates.[29] We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 279.

Nonetheless, respondents urge that the Communications Act, properly understood, does not permit the regulation of CATV systems. First, they emphasize that the

[29] Respondents assert only that this "is subject to considerable question." Brief for Respondent Southwestern Cable Co. 24, n. 25. They rely chiefly upon the language of § 152 (b), which provides that nothing in the Act shall give the Commission jurisdiction over "carriers" that are engaged in interstate communication solely through physical connection, or connection by wire or radio, with the facilities of another carrier, if they are not directly or indirectly controlled by such other carrier. The terms and history of this provision, however, indicate that it was "merely a perfecting amendment" intended to "obviate any possible technical argument that the Commission may attempt to assert common-carrier jurisdiction over point-to-point communication by radio between two points within a single State . . . ." S. Rep. No. 1090, 83d Cong., 2d Sess., 1. See also H. R. Rep. No. 910, 83d Cong., 1st Sess. The Commission and the respondents are agreed, we think properly, that these CATV systems are not common carriers within the meaning of the Act. See 47 U. S. C. § 153 (h); *Frontier Broadcasting Co.* v. *Collier*, 24 F. C. C. 251; *Philadelphia Television Broadcasting Co.* v. *F. C. C.*, 123 U. S. App. D. C. 298, 359 F. 2d 282; CATV and TV Repeater Services, *supra*, at 427–428.

Commission in 1959 and again in 1966 [30] sought legislation that would have explicitly authorized such regulation, and that its efforts were unsuccessful. In the circumstances here, however, this cannot be dispositive. The Commission's requests for legislation evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance than the Communications Act now provides.[31] We have recognized that administrative agencies should, in such situations, be encouraged to seek from Congress clarification of the pertinent statutory provisions. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 47.

Nor can we obtain significant assistance from the various expressions of congressional opinion that followed the Commission's requests. In the first place, the views of one Congress as to the construction of a statute adopted many years before by another Congress have "very little, if any, significance." *Rainwater* v. *United States,* 356 U. S. 590, 593; *United States* v. *Price,* 361 U. S. 304, 313; *Haynes* v. *United States,* 390 U. S. 85, 87, n. 4. Further, it is far from clear that Congress believed, as it considered these requests for legislation, that the Commission did not already possess regulatory authority over CATV. In 1959, the proposed legislation was preceded by the Commission's declarations that it "did not intend to regulate CATV," and that it preferred to rec-

[30] See H. R. 13286, 89th Cong., 2d Sess. The bill was favorably reported by the House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 1635, 89th Cong., 2d Sess., but failed to reach the floor for debate.

[31] See, for the legislation proposed in 1959, CATV and TV Repeater Services, *supra,* at 427–431, 438–439. The Commission in 1966 explicitly stated in its explanation of its proposed amendments to the Act that "we believe it highly desirable that Congress . . . confirm [the Commission's] jurisdiction and . . . establish such basic national policy as it deems appropriate." H. R. Rep. No. 1635, *supra,* at 16.

ommend the adoption of legislation that would impose specified requirements upon CATV systems.[32] Congress may well have been more troubled by the Commission's unwillingness to regulate than by any fears that it was unable to regulate.[33] In 1966, the Commission informed Congress that it desired legislation in order to "confirm [its] jurisdiction and to establish such basic national policy as [Congress] deems appropriate." H. R. Rep. No. 1635, 89th Cong., 2d Sess., 16. In response, the House Committee on Interstate and Foreign Commerce said merely that it did not "either agree or disagree" with the jurisdictional conclusions of the Second Report, and that "the question of whether or not . . . the Commission has authority under present law to regulate CATV systems is for the courts to decide . . . ." *Id.*, at 9. In these circumstances, we cannot derive from the Commission's requests for legislation anything of significant bearing on the construction question now before us.

Second, respondents urge that § 152 (a)[34] does not

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[32] See S. Rep. No. 923, 86th Cong., 1st Sess., 5–6.

[33] Thus, the Senate Committee on Interstate and Foreign Commerce observed in its 1959 Report that although the Commission's staff had recommended that authority be asserted over CATV, the Commission had "long hesitated," and had only recently made clear "that it did not intend to regulate CATV systems in any way whatsoever." S. Rep. No. 923, *supra*, at 5. Nonetheless, it must be acknowledged that the debate on the Senate floor centered on the broad question whether the Commission should have authority to regulate CATV. See, *e. g.*, 106 Cong. Rec. 10426.

[34] 47 U. S. C. § 152 (a) provides that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone."

independently confer regulatory authority upon the Commission, but instead merely prescribes the forms of communication to which the Act's other provisions may separately be made applicable. Respondents emphasize that the Commission does not contend either that CATV systems are common carriers, and thus within Title II of the Act, or that they are broadcasters, and thus within Title III. They conclude that CATV, with certain of the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither, eludes altogether the Act's grasp.

We cannot construe the Act so restrictively. Nothing in the language of § 152 (a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio . . . ." Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication . . . ." S. Rep. No. 781, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F. C. C.* v. *Pottsville Broadcasting Co., supra,* at 138, that it conferred upon the Commission a "unified jurisdiction" [35] and "broad authority." [36] Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting

[35] S. Rep. No. 781, *supra,* at 1.

[36] H. R. Rep. No. 1850, *supra,* at 1.

and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *F. C. C.* v. *Pottsville Broadcasting Co., supra,* at 138. Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 219. We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over "all interstate . . . communication by wire or radio." [37]

Moreover, the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities. Congress has imposed upon the Commission the "obligation of providing a widely dispersed radio and television service," [38] with a "fair, efficient, and equitable distribution" of service among the

[37] Respondents argue, and the Court of Appeals evidently concluded, that the opinion of the Court in *Regents* v. *Carroll,* 338 U. S. 586, supports the inference that the Commission's authority is limited to licensees, carriers, and others specifically reached by the Act's other provisions. We find this unpersuasive. The Court in *Carroll* considered the very general contention that the Commission had been given authority "to determine the validity of contracts between licensees and others." *Id.,* at 602. It was concerned, not with the limits of the Commission's authority over a form of communication by wire or radio, but with efforts to enforce a contract that had been repudiated upon the demand of the Commission. The Court's discussion of the Commission's authority under § 303 (r), see *id.,* at 600, must be read in that context, and as thus read it cannot be controlling here.

[38] S. Rep. No. 923, *supra,* at 7. The Committee added that "Congress and the people" have no particular interest in the success of any given broadcaster, but if the failure of a station "leaves a community with inferior service," this becomes "a matter of real and immediate public concern." *Ibid.*

"several States and communities." 47 U. S. C. § 307 (b). The Commission has, for this and other purposes, been granted authority to allocate broadcasting zones or areas, and to provide regulations "as it may deem necessary" to prevent interference among the various stations. 47 U. S. C. §§ 303 (f), (h). The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that "all communities of appreciable size [will] have at least one television station as an outlet for local self-expression." [39] In turn, the Commission has held that an appropriate system of local broadcasting may be created only if two subsidiary goals are realized. First, significantly wider use must be made of the available ultra-high-frequency channels.[40] Second, communities must be encouraged "to launch sound and

[39] H. R. Rep. No. 1559, 87th Cong., 2d Sess., 3; Sixth Report and Order, 17 Fed. Reg. 3905. And see Staff of the Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., The Television Inquiry: The Problem of Television Service for Smaller Communities 3–4 (Comm. Print 1959). The Senate Committee has elsewhere stated that "[t]here should be no weakening of the Commission's announced goal of local service." S. Rep. No. 923, *supra*, at 7.

[40] The Commission has allocated 82 channels for television broadcasting, of which 70 are in the UHF portion of the radio spectrum. This permits a total of 681 VHF stations and 1,544 UHF stations. H. R. Rep. No. 1559, *supra*, at 2. In December 1964, 454 VHF stations were on the air, 25 permittees were not operating, and 11 applications were awaiting Commission action, leaving 63 unreserved VHF allocations available. Seiden, *supra*, 162, n. 11, at 10. At the same time, 90 UHF stations were operating, 66 were assigned but not operating, 52 applications were pending before the Commission, and 1,108 allocations were still available. *Ibid.* The Commission has concluded that, in these circumstances, "an adequate national television system can be achieved" only if more of the available UHF channels are utilized. H. R. Rep. No. 1559, *supra*, at 4.

adequate programs to utilize the television channels now reserved for educational purposes." [41] These subsidiary goals have received the endorsement of Congress.[42]

The Commission has reasonably found that the achievement of each of these purposes is "placed in jeopardy by the unregulated explosive growth of CATV." H. R. Rep. No. 1635, 89th Cong., 2d Sess., 7. Although CATV may in some circumstances make possible "the realization of some of the [Commission's] most important goals," First Report and Order, *supra*, at 699, its importation of distant signals into the service areas of local stations may also "destroy or seriously degrade the service offered by a television broadcaster," *id.*, at 700, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations.[43] In particular,

[41] S. Rep. No. 67, 87th Cong., 1st Sess., 8–9. The Committee indicated that it was "of utmost importance to the Nation that a reasonable opportunity be afforded educational institutions to use television as a noncommercial educational medium." *Id.*, at 3. Similarly, the House Committee on Interstate and Foreign Commerce has concluded that educational television will "provide a much needed source of cultural and informational programing for all audiences . . . ." H. R. Rep. No. 1559, *supra*, at 3. It is thus an essential element of "an adequate national television system." *Id.*, at 4. See also H. R. Rep. No. 572, 90th Cong., 1st Sess.; S. Rep. No. 222, 90th Cong., 1st Sess.

[42] Legislation was adopted in 1962 to amend the Communications Act in order to require that all television receivers thereafter shipped in interstate commerce for sale or resale to the public be capable of receiving both UHF and VHF frequencies. 76 Stat. 150. The legislation was plainly intended to assist the growth of UHF broadcasting. See H. R. Rep. No. 1559, *supra*. Moreover, legislation has been adopted to provide construction grants and other assistance to educational television systems. 76 Stat. 68, 81 Stat. 365.

[43] See generally Second Report and Order, *supra*, at 736–745. It is pertinent that the Senate Committee on Interstate and Foreign Commerce feared even in 1959 that the unrestricted growth of CATV would eliminate local broadcasting, and that, in turn, this would

the Commission feared that CATV might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters.[44] The Commission acknowledged that it could not predict with

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have four undesirable consequences: (1) the local community "would be left without the local service which is necessary if the public is to receive the maximum benefits from the television medium"; (2) the "suburban and rural areas surrounding the central community may be deprived not only of local service but of any service at all"; (3) even "the resident of the central community may be deprived of all service if he cannot afford the connection charge and monthly service fees of the CATV system"; (4) "[u]nrestrained CATV, booster, or translator operation might eventually result in large regions, or even entire States, being deprived of all local television service—or being left, at best, with nothing more than a highly limited satellite service." S. Rep. No. 923, *supra*, at 7–8. The Committee concluded that CATV competition "does have an effect on the orderly development of television." *Id.*, at 8.

[44] The Commission has found that "we are in a critical period with respect to UHF development. Most of the new UHF stations will face considerable financial obstacles." First Report and Order, *supra*, at 712. It concluded that "one general factor giving cause for serious concern," *ibid.*, was that there is "likely" to be a "severe" impact between new local stations, particularly UHF stations, and CATV systems. *Id.*, at 713. Further, the Commission believed that there was danger that CATV systems would "siphon off sufficient local financial support" for educational television, with the result that such stations would fail or not be established at all. It feared that "the loss would be keenly felt by the public." Second Report and Order, *supra*, at 761. The Commission concluded that the hazards to educational television were "sufficiently strong to warrant some special protection . . . ." *Id.*, at 762. Similarly, a recent study has found that CATV systems may have a substantial impact upon station revenues, that many stations, particularly in small markets, cannot readily afford such competition, and that in consequence a "substantial percentage of potential new station entrants, particularly UHF, are likely to be discouraged . . . ." Fisher & Ferrall, Community Antenna Television Systems and Local Television Station Audience, 80 Q. J. Econ. 227, 250.

certainty the consequences of unregulated CATV, but reasoned that its statutory responsibilities demand that it "plan in advance of foreseeable events, instead of waiting to react to them." *Id.*, at 701. We are aware that these consequences have been variously estimated,[45] but must conclude that there is substantial evidence that the Commission cannot "discharge its overall responsibilities without authority over this important aspect of television service." Staff of Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., The Television Inquiry: The Problem of Television Service for Smaller Communities 19 (Comm. Print 1959).

The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems. We have elsewhere held that we may not, "in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes." *Permian Basin Area Rate Cases*, 390 U. S.

[45] Compare the following. Seiden, *supra*, at 64–90; Note, The Federal Communications Commission and Regulation of CATV, 43 N. Y. U. L. Rev. 117, 133–139; Note, The Wire Mire: The FCC and CATV, *supra*, at 376–383; Fisher & Ferrall, *supra*. We note, in addition, that the dispute here is in part whether local, advertiser-supported stations are an appropriate foundation for a national system of television broadcasting. See generally Coase, The Economics of Broadcasting and Government Policy, 56 Am. Econ. Rev. 440 (May 1966); Greenberg, Wire Television and the FCC's Second Report and Order on CATV Systems, 10 J. Law & Econ. 181.

747, 780. Compare *National Broadcasting Co.* v. *United States, supra,* at 219–220; *American Trucking Assns.* v. *United States,* 344 U. S. 298, 311. There is no such evidence here, and we therefore hold that the Commission's authority over "all interstate . . . communication by wire or radio" permits the regulation of CATV systems.

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152 (a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires." 47 U. S. C. § 303 (r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

III.

We must next determine whether the Commission has authority under the Communications Act to issue the particular prohibitory order in question in these proceedings. In its Second Report and Order, *supra,* the Commission concluded that it should provide summary procedures for the disposition both of requests for special relief and of "complaints or disputes." *Id.,* at 764. It feared that if evidentiary hearings were in every situation mandatory they would prove "time consuming and burdensome" to the CATV systems and broadcasting stations involved. *Ibid.* The Commission considered that appropriate notice and opportunities for comment or objection must be given, and it declared that "additional procedures, such as oral argument, evidentiary

hearing, or further written submissions" would be permitted "if they appear necessary or appropriate . . . ." *Ibid.* See 47 CFR § 74.1109 (f). It was under the authority of these provisions that Midwest sought, and the Commission granted, temporary relief.

The Commission, after examination of various responsive pleadings but without prior hearings, ordered that respondents generally restrict their carriage of Los Angeles signals to areas served by them on February 15, 1966, pending hearings to determine whether the carriage of such signals into San Diego contravenes the public interest. The order does not prohibit the addition of new subscribers within areas served by respondents on February 15, 1966; it does not prevent service to other subscribers who began receiving service or who submitted an "accepted subscription request" between February 15, 1966, and the date of the Commission's order; and it does not preclude the carriage of San Diego and Tijuana, Mexico, signals to subscribers in new areas of service. 4 F. C. C. 2d 612, 624–625. The order is thus designed simply to preserve the situation as it existed at the moment of its issuance.

Respondents urge that the Commission may issue prohibitory orders only under the authority of § 312 (b), by which the Commission is empowered to issue cease-and-desist orders. We shall assume that, consistent with the requirements of § 312 (c), cease-and-desist orders are proper only after hearing or waiver of the right to hearing. Nonetheless, the requirement does not invalidate the order issued in this case, for we have concluded that the provisions of §§ 312 (b), (c) are inapplicable here. Section 312 (b) provides that a cease-and-desist order may issue only if the respondent "has violated or failed to observe" a provision of the Communications Act or a rule or regulation promulgated by the Commission under the Act's authority. Respondents here were not found

to have violated or to have failed to observe any such restriction; the question before the Commission was instead only whether an existing situation should be preserved pending a determination "whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission." 4 F. C. C. 2d, at 626. The Commission's order was thus not, in form or function, a cease-and-desist order that must issue under §§ 312 (b), (c).[46]

The Commission has acknowledged that, in this area of rapid and significant change, there may be situations in which its generalized regulations are inadequate, and special or additional forms of relief are imperative. It has found that the present case may prove to be such a situation, and that the public interest demands "interim relief . . . limiting further expansion," pending hearings to determine appropriate Commission action. Such orders do not exceed the Commission's authority. This Court has recognized that "the administrative process [must] possess sufficient flexibility to adjust itself" to the "dynamic aspects of radio transmission," *F. C. C.* v. *Pottsville Broadcasting Co., supra,* at 138, and that it was precisely for that reason that Congress declined to "stereotyp[e] the powers of the Commission to specific details . . . ." *National Broadcasting Co.* v. *United States, supra,* at 219. And compare *American Trucking Assns.* v. *United States,* 344 U. S. 298, 311; *R. A. Holman & Co.* v. *S. E. C.,* 112 U. S. App. D. C. 43, 47–48, 299 F. 2d 127,

[46] Respondents urge that the legislative history of § 312 (b) indicates that the Commission may issue prohibitory orders only under, and in conformity with, that section. We find this unpersuasive. Nothing in that history suggests that the Commission was deprived of its authority, granted elsewhere in the Act, to issue orders "necessary in the execution of its functions." 47 U. S. C. § 154 (i). See also 47 U. S. C. § 303 (r).

131–132. Thus, the Commission has been explicitly authorized to issue "such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." 47 U. S. C. § 154 (i). See also 47 U. S. C. § 303 (r). In these circumstances, we hold that the Commission's order limiting further expansion of respondents' service pending appropriate hearings did not exceed or abuse its authority under the Communications Act. And there is no claim that its procedure in this respect is in any way constitutionally infirm.

The judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion. *It is so ordered.*

MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE WHITE, concurring in the result.

My route to reversal of the Court of Appeals is somewhat different from the Court's. Section 2 (a) of the Communications Act, 47 U. S. C. § 152 (a), says that "[*t*]*he provisions of this chapter* shall apply to all interstate and foreign communication by wire or radio . . . ." (Emphasis added.) I am inclined to believe that this section means that the Commission must generally base jurisdiction on other provisions of the Act. This position would not, however, require invalidation of the assertion of jurisdiction before us today. Section 301, 47 U. S. C. § 301, gives the Commission broad authority over broadcasting, and § 303, 47 U. S. C. § 303, confers authority to "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter" and also the authority to establish areas or zones to be served by any station. The Commission has ample

power under these provisions to prevent a Los Angeles television broadcaster from interfering with broadcasting in San Diego. For example, the Commission could stop a Los Angeles television station from owning and operating a wire CATV system which carried the station's signals into San Diego. The Commission should also be able to prevent a third party from disrupting Commission-licensed broadcasting in the San Diego market.

Even if §§ 301 and 303 in themselves furnish insufficient basis for the Commission to enjoin extraneous interference with the San Diego broadcasting scheme it has authorized, § 2 (a), *supra*, makes the provisions of the Act, including §§ 301 and 303, applicable to all wire and radio communication. Hence the Commission is authorized to regulate wire communications to implement the ends of §§ 301 and 303, and authorized as well to use its express authority over broadcasting to enforce its specific powers over common carriers by wire.

Syllabus.

MARYLAND ET AL. *v.* WIRTZ, SECRETARY OF LABOR, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

No. 742. Argued April 23, 1968.—Decided June 10, 1968.

The Fair Labor Standards Act, as enacted in 1938, required every employer to pay each of his employees "engaged in commerce or in the production of goods for commerce" certain minimum wages and overtime pay. The definition of employer excluded States and their political subdivisions. In 1961 the Act's coverage was extended beyond employees individually connected to interstate commerce to include all employees of certain "enterprises" engaged in commerce or production for commerce. In 1966 the Act was amended to cover certain hospitals, institutions, and schools, and to modify the definition of employer to remove the exemption of the States and their subdivisions with respect to employees of hospitals, institutions, and schools. Appellants, 28 States and a school district, sought to enjoin enforcement of the Act as it applies to schools and hospitals operated by the States or their subdivisions. They argued that the "enterprise concept" of coverage and the inclusion of state-operated hospitals and schools were beyond Congress' power under the Commerce Clause, that the remedial provisions of the Act, if applied to the States, would conflict with the Eleventh Amendment, and that school and hospital enterprises do not have the statutorily required relationship to interstate commerce. A three-judge district court declined to issue a declaratory judgment or an injunction, and concluded that the adoption of the "enterprise concept" and the extension of coverage to state institutions do not, on the face of the Act, exceed Congress' commerce power. That court declined to consider the Eleventh Amendment and statutory relationship contentions. *Held:*

1. The "enterprise concept" of coverage is clearly within the power of Congress under the Commerce Clause. Pp. 188–193.

(a) A rational basis for Congress' finding the scheme necessary to the protection of commerce was the logical inference that the pay and hours of employees of an interstate business who are not production workers, as well as those who are, affect an

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employer's competition with companies elsewhere. *United States* v. *Darby*, 312 U. S. 100, followed. Pp. 188–191.

(b) Another rational basis is the promotion of labor peace by the regulation of wages and hours, subjects of frequent labor disputes. Pp. 191–192.

(c) The class of employers subject to the Act, approved in *Darby, supra*, was not enlarged by the addition of the "enterprise concept." P. 193.

2. The commerce power provides a constitutional basis for extension of the Act to state-operated schools and hospitals. Pp. 193–199.

(a) Congress has "interfered with" state functions only to the extent that it subjects a State to the same minimum wage and overtime pay limitations as other employers whose activities affect commerce. Pp. 193–194.

(b) Labor conditions in schools and hospitals can affect commerce and are within the reach of the commerce power. Pp. 194–195.

(c) Where a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State may be forced to conform its activities to federal regulation. *United States* v. *California*, 297 U. S. 175. Pp. 195–199.

3. Questions concerning the States' sovereign immunity from suit and whether particular state-operated institutions have employees handling goods in commerce are reserved for appropriate concrete cases. Pp. 199–201.

269 F. Supp. 826, affirmed.

Alan M. Wilner, Assistant Attorney General of Maryland, and *Charles Alan Wright* argued the cause for appellants. With *Mr. Wilner* on the brief for appellant the State of Maryland et al. were the Attorneys General for their respective States as follows: *Francis B. Burch* of Maryland, *Crawford C. Martin* of Texas, *MacDonald Gallion* of Alabama, *Darrell F. Smith* of Arizona, *Joe Purcell* of Arkansas, *Duke W. Dunbar* of Colorado, *David Buckson* of Delaware, *Earl Faircloth* of Florida, *Bert T. Kobayashi* of Hawaii, *William G. Clark* of Illinois, *Richard C. Turner* of Iowa, *Robert C. Londerholm*

of Kansas, *James S. Erwin* of Maine, *Elliot L. Richardson* of Massachusetts, *Joe T. Patterson* of Mississippi, *Norman H. Anderson* of Missouri, *Clarence A. H. Meyer* of Nebraska, *Arthur J. Sills* of New Jersey, *Boston E. Witt* of New Mexico, *T. Wade Bruton* of North Carolina, *Helgi Johanneson* of North Dakota, *William B. Saxbe* of Ohio, *G. T. Blankenship* of Oklahoma, *Daniel R. McLeod* of South Carolina, *Frank L. Farrar* of South Dakota, *James L. Oakes* of Vermont, *Robert Y. Button* of Virginia, and *James E. Barrett* of Wyoming; and *A. J. Carubbi, Jr.*, Executive Assistant Attorney General of Texas, *Hawthorne Phillips*, Assistant Attorney General of Texas, and *James V. Noble*, Assistant Attorney General of New Mexico. With *Mr. Wright* on the brief for appellant the State of Texas were *Messrs. Martin, Carubbi*, and *Phillips*, and *Nola White*, First Assistant Attorney General. *Cecil A. Morgan* filed a brief for appellant Fort Worth Independent School District.

Solicitor General Griswold argued the cause for appellees. With him on the brief were *Assistant Attorney General Weisl, Louis F. Claiborne, John S. Martin, Jr.*, and *Morton Hollander*.

Briefs of *amici curiae*, urging affirmance, were filed by *J. Albert Woll, Laurence Gold*, and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations, and by *Henry Kaiser* and *Ronald Rosenberg* for the American Federation of State, County, and Municipal Employees, AFL–CIO.

MR. JUSTICE HARLAN delivered the opinion of the Court.

As originally enacted,[1] the Fair Labor Standards Act of 1938 required every employer to pay each of his employees "engaged in commerce or in the production

[1] 52 Stat. 1060.

of goods for commerce" [2] a certain minimum hourly wage, and to pay at a higher rate for work in excess of a certain maximum number of hours per week. The Act defined the term "employer" so as to exclude "the United States or any State or political subdivision of a State . . . ." [3] This case involves the constitutionality of two sets of amendments to the original enactment.

In 1961, Congress changed the basis of employee coverage: instead of extending protection to employees individually connected to interstate commerce, the Act now covers all employees of any "enterprise" engaged in commerce or production for commerce, provided the enterprise also falls within certain listed categories.[4] In 1966, Congress added to the list of categories the following:

> "(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for the mentally or physically handicapped or gifted children, an elementary or secondary school, or an insti-

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[2] §§ 6 (a), 7 (a), 52 Stat. 1062, 1063.

[3] § 3 (d), 52 Stat. 1060.

[4] The minimum wage requirement, 29 U. S. C. § 206 (1964 ed., Supp. II), now reads as follows: "(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . ." The maximum hours requirement, 29 U. S. C. § 207 (1964 ed., Supp. II), now contains a similar definition of covered employees. The term "enterprise engaged in commerce or in the production of goods for commerce" is defined by 29 U. S. C. § 203 (s) (1964 ed., Supp. II) to mean "an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—[falls in any one of four listed categories] . . . ."

> tution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)." [5]

At the same time, Congress modified the definition of "employer" so as to remove the exemption of the States and their political subdivisions with respect to employees of hospitals, institutions, and schools.[6]

The State of Maryland, since joined by 27 other States and one school district, brought this action against the Secretary of Labor to enjoin enforcement of the Act insofar as it now applies to schools and hospitals operated by the States or their subdivisions. The plaintiffs made four contentions. They argued that the expansion of coverage through the "enterprise concept" was beyond the power of Congress under the Commerce Clause. They contended that coverage of state-operated hospitals and schools was also beyond the commerce power. They asserted that the remedial provisions of the Act,[7] if applied to the States, would conflict with the Eleventh Amendment. Finally, they urged that even if their constitutional arguments were rejected, the court should declare that schools and hospitals, as enterprises, do not have the statutorily required relationship to interstate commerce.

A three-judge district court, convened pursuant to 28 U. S. C. § 2282, declined to issue a declaratory judgment or an injunction.[8] Three opinions were written. Judges Winter and Thomsen, constituting the majority, concluded for different reasons that the adoption of the "enterprise concept" of coverage and the extension of coverage to state institutions could not be said, on the

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[5] 80 Stat. 832, 29 U. S. C. § 203 (s)(4) (1964 ed., Supp. II).

[6] 80 Stat. 831, 29 U. S. C. § 203 (d) (1964 ed., Supp. II).

[7] 29 U. S. C. §§ 216 (b), 216 (c), 217.

[8] 269 F. Supp. 826.

face of the Act, to exceed Congress' power under the Commerce Clause. Both declined to consider the Eleventh Amendment and statutory contentions. Judge Northrop dissented, concluding that the amendments exceeded the commerce power because they transgressed the sovereignty of the States.

We noted probable jurisdiction of the plaintiffs' appeal, 389 U. S. 1031. For reasons to follow, we affirm the judgment of the District Court.

I.

We turn first to the adoption in 1961 of the "enterprise concept." Whereas the Act originally extended to every employee "who is engaged in commerce or in the production of goods for commerce," it now protects every employee who "is employed in an enterprise engaged in commerce or in the production of goods for commerce." [9] Such an enterprise is defined as one which, along with other qualifications, "has employees engaged in commerce or in the production of goods for commerce . . . ." [10] Thus the effect of the 1961 change was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not to enlarge the class of *employers* subject to the Act.

In *United States* v. *Darby*, 312 U. S. 100, this Court found the original Act a legitimate exercise of congressional power to regulate commerce among the States. Appellants accept the *Darby* decision, but contend that the extension of protection to fellow employees of those originally covered exceeds the commerce power. We conclude, to the contrary, that the constitutionality of the "enterprise concept" is settled by the reasoning of *Darby* itself and is independently established by principles stated in other cases.

[9] 29 U. S. C. §§ 206 (a), 207 (a) (1964 ed., Supp. II).

[10] 29 U. S. C. § 203 (s) (1964 ed., Supp. II).

Darby involved employees who were engaged in producing goods for commerce. Their employer contended that since manufacturing is itself an intrastate activity, Congress had no power to regulate the wages and hours of manufacturing employees. The first step in the Court's answer was clear: "[Congress may] by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce." [11]

The next step was to discover whether such a "substantial effect" existed. Congress had found that substandard wages and excessive hours, when imposed on employees of a company shipping goods into other States, gave the exporting company an advantage over companies in the importing States. Having so found, Congress decided as a matter of policy that such an advantage in interstate competition was an "unfair" one, and one that had the additional undesirable effect of driving down labor conditions in the importing States.[12] This Court was of course concerned only with the finding of a substantial effect on interstate competition, and not with

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[11] 312 U. S., at 119. The Act prohibited both the interstate transportation of goods produced under substandard labor conditions, and the maintenance of such conditions themselves. The first prohibition, a restraint on commerce itself, was upheld against the contention that its real motive or purpose was to regulate manufacturing. The language quoted in the text answered a challenge to the second prohibition.

[12] Section 2 of the Act, 52 Stat. 1060, 29 U. S. C. § 202, reads in part as follows:

"The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce . . . ."

the consequent policy decisions. In accepting the congressional finding, the Court followed principles of judicial review only recently rearticulated in *Katzenbach* v. *McClung*, 379 U. S. 294, 303–304:

> "Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." [13]

There was obviously a "rational basis" for the logical inference that the pay and hours of production employees affect a company's competitive position.

The logical inference does not stop with production employees. When a company does an interstate business, its competition with companies elsewhere is affected by all its significant labor costs, not merely by the wages and hours of those employees who have physical contact with the goods in question. Consequently, it is not surprising that this Court has already explicitly recognized that Congress' original choice to extend the Act only to certain employees of interstate enterprises was not constitutionally compelled; rather, Congress decided, at that time, "not to enter areas which it might have occupied

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[13] In *Katzenbach* v. *McClung*, it appeared that Congress had undertaken extensive investigation of the commercial need for the statute there involved. A major contention of the appellants in the present case is that the legislative history of the amendments now before us lays no factual predicate for extensions of the original Act. To the extent that this is true, it is quite irrelevant. The original Act stated Congress' findings and purposes as of 1938. Subsequent extensions of coverage were presumably based on similar findings and purposes with respect to the areas newly covered. We are not concerned with the manner in which Congress reached its factual conclusions.

[under the commerce power]." *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 522.

The "enterprise concept" is also supported by a wholly different line of analysis. In the original Act, Congress stated its finding that substandard labor conditions tended to lead to labor disputes and strikes, and that when such strife disrupted businesses involved in interstate commerce, the flow of goods in commerce was itself affected.[14] Congress therefore chose to promote labor peace by regulation of subject matter, wages, and hours, out of which disputes frequently arise. This objective is particularly relevant where, as here,[15] the enterprises in question are significant importers of goods from other States.

Although the Court did not examine this second objective in *Darby*, other cases have found a "rational basis" for statutes regulating labor conditions in order to protect interstate commerce from labor strife. The National Labor Relations Act[16] had been passed because

> "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . ."[17]

In *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, this Court held that the National Labor Relations Act (NLRA) was within the commerce power. The essence of the decision was contained in two propositions: "the stoppage of those [respondent's] operations by industrial

[14] Section 2, 29 U. S. C. § 202, declares in part that the existence of substandard labor conditions "leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce."

[15] See *infra*, at 194–195.

[16] 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*

[17] § 1, 49 Stat. 449.

strife would have a most serious effect upon interstate commerce," *id.*, at 41; and "[e]xperience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace." *Id.*, at 42.

The Fair Labor Standards Act, including the present "enterprise" definition of coverage, may also be supported by two propositions. One is identical with the first proposition supporting the NLRA: strife disrupting an enterprise involved in commerce may disrupt commerce. The other is parallel to the second proposition supporting the NLRA: there is a basis in logic and experience for the conclusion that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise.

Whether the "enterprise concept" is defended on the "competition" theory or on the "labor dispute" theory, it is true that labor conditions in businesses having only a few employees engaged in commerce or production may not affect commerce very much or very often. Appellants therefore contend that defining covered enterprises in terms of their employees is sometimes to permit "the tail to wag the dog." However, while Congress has in some instances left to the courts or to administrative agencies the task of determining whether commerce is affected in a particular instance, *Darby* itself recognized the power of Congress instead to declare that an entire class of activities affects commerce.[18] The only question for the courts is then whether the class is "within the reach of the federal power."[19] The contention that in

[18] 312 U. S., at 120–121.

[19] *Ibid.*

Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest. *Wickard* v. *Filburn*, 317 U. S. 111, 127–128; *Polish Alliance* v. *Labor Board*, 322 U. S. 643, 648; *Katzenbach* v. *McClung*, *supra*, at 301. The class of employers subject to the Act was not enlarged by the addition of the enterprise concept. The definition of that class is as rational now as it was when *Darby* was decided.

II.

Appellants' second contention is that the commerce power does not afford a constitutional basis for extension of the Act to schools and hospitals operated by the States or their subdivisions. Since the argument is made in terms of interference with "sovereign state functions," it is important to note exactly what the Act does. Although it applies to "employees," the Act specifically exempts any "employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) . . . ." [20] We assume, as did the District Court,[21] that medical personnel are likewise excluded from coverage under the general language. The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate. Congress has "interfered with" these

[20] 29 U. S. C. § 213 (1) (1964 ed., Supp. II).

[21] See 269 F. Supp., at 832 (opinion of Judge Winter).

state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals.[22]

It is clear that labor conditions in schools and hospitals can affect commerce. The facts stipulated in this case indicate that such institutions are major users of goods imported from other States. For example:

> "In the current fiscal year an estimated $38.3 billion will be spent by State and local public educational institutions in the United States. In the fiscal year 1965, these same authorities spent $3.9 billion operating public hospitals. . . .
>
> "For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies and equipment by its public school system during the fiscal year 1965 represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and equipment and hospital beds by the University of Maryland Hospital and seven other state hospitals were out-of-state purchases." [23]

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[22] In the court below, Judge Thomsen was troubled by the application of the overtime provisions to school and hospital personnel, who may have different arrangements for hours of work than employees of other enterprises. 269 F. Supp., at 851. Congress indicated its attention to this problem in 29 U. S. C. § 207 (1964 ed., Supp. II), which provides special means of computing hospital overtime. That this provision may seem to some inadequate, and that no similar provision was made in the case of schools, are matters outside judicial cognizance. The Act's overtime provisions apply to a wide range of enterprises, with differing patterns of worktime; they were intended to change some of those patterns. It is not for the courts to decide that such changes as may be required are beneficial in the case of some industries and harmful in others.

[23] 269 F. Supp., at 833 (opinion of Judge Winter).

Similar figures were supplied for other States.[24] Strikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent,[25] obviously interrupt and burden this flow of goods across state lines. It is therefore clear that a "rational basis" exists for congressional action prescribing minimum labor standards for schools and hospitals, as for other importing enterprises.[26]

Indeed, appellants do not contend that labor conditions in all schools and hospitals are without the reach of the commerce power, but only that the Act may not be constitutionally applied to state-operated institutions because that power must yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable. There is no general

> "doctrine implied in the Federal Constitution that 'the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.' " *Case* v. *Bowles*, 327 U. S. 92, 101.

In the first place, it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as "governmental" or "proprietary" in character. As long ago as *Sanitary District* v. *United States*, 266 U. S. 405, the Court put to rest the contention that state concerns might constitutionally "outweigh" the importance of an otherwise valid federal statute regulating

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[24] See *ibid.*

[25] See U. S. Department of Labor, Summary Release, Work Stoppages Involving Government Employees, 1966.

[26] Both under the present Act and the National Labor Relations Act, numerous cases have held that the engagement of an enterprise in interstate commerce may consist of importation. *E. g., Wirtz* v. *Hardin & Co.*, 253 F. Supp. 579, aff'd, 359 F. 2d 792 (FLSA); *N. L. R. B.* v. *Baker Hotel*, 311 F. 2d 528 (NLRA).

commerce. Congress had imposed statutory limits on the diversion of water from Lake Michigan. A unanimous Court, speaking through Mr. Justice Holmes, declared that the sanitary district's alleged need for more water than federal law allowed was "irrelevant" because federal power over commerce is "superior to that of the States to provide for the welfare or necessities of their inhabitants." *Id.*, at 426. See *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508.

There remains, of course, the question whether any particular statute is an "otherwise valid regulation of commerce." This Court has always recognized that the power to regulate commerce, though broad indeed, has limits. Mr. Chief Justice Marshall paused to recognize those limits in the course of the opinion that first staked out the vast expanse of federal authority over the economic life of the new Nation. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195. Mr. Chief Justice Hughes, speaking only one Term after he delivered the opinion for the Court in *Jones & Laughlin, supra,* put the matter thus:

> "The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains." *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 466.

The Court has ample power to prevent what the appellants purport to fear, "the utter destruction of the State as a sovereign political entity." [27]

But while the commerce power has limits, valid general regulations of commerce do not cease to be regula-

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[27] The dissent suggests that by use of an "enterprise concept" such as that we have upheld here, Congress could under today's decision declare a whole State an "enterprise" affecting commerce and take over its budgeting activities. This reflects, we think, a

tions of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. This was settled by the unanimous decision in *United States* v. *California*, 297 U. S. 175. The question was whether a railroad, operated by the State, and entirely within the State, as a nonprofit venture for the purpose of facilitating transportation at a port, was nevertheless subject, like other railroads, to the Safety Appliance Act. The Court first held that although the railroad operated only between points in California, it was within the reach of federal regulation of interstate rail transportation. 297 U. S., at 181–183. The Court then proceeded to consider the claim that the State "is not subject to the federal Safety Appliance Act," and reasoned as follows:

> "[W]e think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its

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misreading of the Act, of *Wickard* v. *Filburn*, *supra*, and of our decision. The Act's definition of "enterprise" reads in part as follows:

"'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . but shall not include the related activities performed for such enterprise by an independent contractor . . . ." 29 U. S. C. § 203(r).

We uphold the enterprise concept on the explicit premise that an "enterprise" is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group of employees, which is what Congress obviously intended. So defined, the term is quite cognizant of limitations on the commerce power. Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.

'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.

. . . . . .

"[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual." 297 U. S., at 183–185 (citations omitted).

See also *Board of Trustees* v. *United States*, 289 U. S. 48, where the Court rejected a claim of "state sovereignty" and held that a state university that imported scientific apparatus from abroad could be made to pay import duties imposed pursuant to the power over foreign commerce.

The principle of *United States* v. *California* is controlling here. Appellants' argument that the statute involved there was somewhat more directly and obviously a regulation of "commerce," and that the state activity involved there was less central to state sovereignty, misses the mark. This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises

indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens.[28]

III.

Appellants raise two further issues, both of which the District Court found it inappropriate to explore fully in a declaratory judgment proceeding. We agree. In each case we conclude that no showing has been made that warrants declaratory or injunctive relief. In neither instance, however, do we mean to preclude future consideration on the facts of individual cases.

The first question is whether the Act violates the States' sovereign immunity from suit guaranteed by the Eleventh Amendment.[29] The Act provides as follows:

> "Any employer who violates the provisions of section 206 [wages] or section 207 [hours] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction . . . ." 29 U. S. C. § 216 (b).

The Act also provides for suits by the Secretary of Labor to recover unpaid minimum wages or overtime compen-

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[28] Nor is it relevant that Congress originally chose to exempt all state enterprises and later partially removed that exemption. Congress was as free to include state activities within the general regulation at a later date as it would have been to omit the exemption in the first place.

[29] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

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sation, 29 U. S. C. § 216 (c) and for injunctive relief against violations, 29 U. S. C. § 217.

Percolating through each of these provisions for relief are interests of the United States and problems of immunity, agency, and consent to suit. Cf. *Parden* v. *Terminal R. Co.*, 377 U. S. 184. The constitutionality of applying the substantive requirements of the Act to the States is not, in our view, affected by the possibility that one or more of the remedies the Act provides might not be available when a State is the employer-defendant. Particularly in light of the Act's "separability" provision, 29 U. S. C. § 219, we see no reason to strike down otherwise valid portions of the Act simply because other portions might not be constitutional as applied to hypothetical future cases. At the same time, we decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. Questions of state immunity are therefore reserved for appropriate future cases.

Appellants' remaining contention presents similar problems. In order to be covered by the Act, an employer hospital or school must in fact have

> "employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person . . . ." 29 U. S. C. § 203 (s) (1964 ed., Supp. II).

Appellants ask us to declare that hospitals and schools simply have no such employees. The word "goods" is elsewhere defined to exclude "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or

processor thereof." 29 U. S. C. § 203 (i). Appellants contend that hospitals and schools are the ultimate consumers of the out-of-state products they buy, and hence none of their employees handles "goods" in the statutory sense.

We think the District Court was correct in declining to decide, in the abstract and in general, whether schools and hospitals have employees engaged in commerce or production. Such institutions, as a whole, obviously purchase a vast range of out-of-state commodities. These are put to a wide variety of uses, presumably ranging from physical incorporation of building materials into hospital and school structures, to over-the-counter sale for cash to patients, visitors, students, and teachers. Whether particular institutions have employees handling goods in commerce, cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, may be considered as occasion requires.

The judgment of the District Court is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

The Court's opinion skillfully brings employees of state-owned enterprises within the reach of the Commerce Clause; and as an exercise in semantics it is unexceptionable if congressional federalism is the standard. But what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism.

The case has some of the echoes of *New York* v. *United States*, 326 U. S. 572, where a divided Court held that

the Federal Government could tax the sale of mineral waters owned and marketed by New York. My dissent was in essence that the decision made the States pay the Federal Government "for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution." 326 U. S., at 596.

The present federal law takes a much more serious bite. The 1966 amendments to the Fair Labor Standards Act require the States to pay school and hospital employees a minimum wage escalating to $1.60 per hour in 1971.[1] As a general rule, the amendments make the States pay their employees who work over 40 hours a week overtime compensation of 1½ times their regular wage.[2] There are civil sanctions against the State and its political subdivisions,[3] and state officials may, apparently, be subjected to criminal penalties.[4] The impact is pervasive, striking at all levels of state government. As Judge Northrop said in his dissent below, 269 F. Supp. 826, 853:

> "By this Act Congress is forcing, under threat of civil liability and criminal penalties, the state legislature or the responsible political subdivision of the state
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> "1. to increase taxes (an impossibility in some of the political subdivisions without a state constitutional amendment); or
>
> "2. to curtail the extent and calibre of services in the public hospitals and educational and related institutions of the state; or

[1] 29 U. S. C. §§ 203 (d), 206 (b) (1964 ed., Supp. II).

[2] 29 U. S. C. § 207 (b) (1964 ed., Supp. II). Special rules are applicable to hospitals under § 207 (j) based on an 80-hour, 14-day work period. No special rules apply to school employees. See discussion of the overtime pay provisions by Chief Judge Thomsen, 269 F. Supp., at 851–852.

[3] 29 U. S. C. §§ 203 (d), 216 (b).

[4] 29 U. S. C. §§ 203 (a), 215, 216 (a).

"3. to reduce indispensable services in other governmental activities to meet the budgets of those activities favored by the United States Congress; or

"4. to refrain from entering new fields of governmental activity necessitated by changing social conditions."

There can be no doubt but that the 1966 amendments to the Fair Labor Standards Act disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education. Yet, the Court considers it irrelevant that these federal regulations are to be enforced against sovereign States and limits its consideration to "whether there is a rational basis for regarding them as regulations of commerce among the States."

The States are not totally immune from federal regulation under the commerce power of Congress. *Parden* v. *Terminal R. Co.*, 377 U. S. 184, and *United States* v. *California*, 297 U. S. 175, subjected state-owned railroads to the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, and the Safety Appliance Act, 45 U. S. C. § 1 *et seq.*; *Board of Trustees* v. *United States*, 289 U. S. 48, required a state university to pay federal customs duties on educational equipment it imported. In *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, the Federal Government was permitted to condemn 100,000 acres of state land for a reservoir to control commerce-paralyzing floods. In *Sanitary District* v. *United States*, 266 U. S. 405, a State was prohibited from diverting water from the Great Lakes necessary to ensure navigability, a phase of commerce.

In none of these cases, however, did the federal regulation overwhelm state fiscal policy. It is one thing to force a State to purchase safety equipment for its railroad and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas. The commerce

power cases the Court relies on are simply not apropos.

In the area of taxation, on the other hand, the Court has recognized that the constitutional scheme of federalism imposes limits on the power of the National Government to tax the States. *E. g., New York* v. *United States,* 326 U. S. 572. The Court will not permit the Federal Government to utilize the taxing power to snuff out state sovereignty, *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, recognizing that the power to tax is the power to destroy. *M'Culloch* v. *Maryland,* 4 Wheat. 316, 431. The exercise of the commerce power may also destroy state sovereignty. All activities affecting commerce, even in the minutest degree, *Wickard* v. *Filburn,* 317 U. S. 111, may be regulated and controlled by Congress. Commercial activity of every stripe may in some way interfere "with the [interstate] flow of merchandise" or interstate travel. *Katzenbach* v. *McClung,* 379 U. S. 294, 299–300. The immense scope of this constitutional power is demonstrated by the Court's approval in this case of regulation on the basis of the "enterprise concept"—which is entirely proper when the regulated "businesses" are not essential functions being carried on by the States.

Yet state government itself is an "enterprise" with a very substantial effect on interstate commerce, for the States spend billions of dollars each year on programs that purchase goods from interstate commerce, hire employees whose labor strife could disrupt interstate commerce, and act on such commerce in countless subtle ways. If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build superhighways crisscrossing their territory in order to accommodate interstate vehicles, to provide inns and eating places for interstate travelers, to quadruple their police forces in order to prevent

commerce-crippling riots, etc.? Could the Congress virtually draw up each State's budget to avoid "disruptive effect[s] . . . on commercial intercourse."? *Atlanta Motel* v. *United States,* 379 U. S. 241, 257.

If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment. The principles which should guide us in this case are set forth in the several opinions in *New York* v. *United States, supra.* As Mr. Chief Justice Stone said there, the National Government may not "interfere unduly with the State's performance of its sovereign functions of government." 326 U. S., at 587. It may not "impair the State's functions of government," *id.,* at 594 (dissenting opinion of MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BLACK). As Mr. Justice Frankfurter observed, "[t]here are, of course, State activities . . . that partake of uniqueness from the point of view of intergovernmental relations." *Id.,* at 582.

Whether, in a given case, a particular commerce power regulation by Congress of state activity is permissible depends on the facts. The Court must draw the "constitutional line between the State as government and the State as trader . . . ." *New York* v. *United States, supra,* at 579 (opinion of Mr. Justice Frankfurter). In this case the State as a sovereign power is being seriously tampered with, potentially crippled.

I would reverse the judgment below.

CHENG FAN KWOK *v.* IMMIGRATION AND NATURALIZATION SERVICE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 638. Argued May 2, 1968.—Decided June 10, 1968.

Jurisdiction to review the denial by a district director of immigration of a stay of deportation, requested by a Chinese seaman who had deserted his ship and remained unlawfully in this country, where the pertinent order was not entered in the course of a deportation proceeding conducted under § 242 (b) of the Immigration and Nationality Act, is not, under the provisions of § 106 (a), vested exclusively in the courts of appeals. Pp. 208–218.

381 F. 2d 542, affirmed.

Jules E. Coven argued the cause for petitioner. With him on the brief was *Abraham Lebenkoff*.

Charles Gordon argued the cause for respondent. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Francis X. Beytagh, Jr.*

William H. Dempsey, Jr., by invitation of the Court, 390 U. S. 918, argued the cause and filed a brief, as *amicus curiae,* urging affirmance.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The narrow question presented by this case is whether jurisdiction to review the denial of a stay of deportation, if the pertinent order has not been entered in the course of a proceeding conducted under § 242 (b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U. S. C. § 1252 (b), is, under § 106 (a) of the Act, 75 Stat. 651, 8 U. S. C. § 1105a (a), vested exclusively in the courts of

appeals.[1] The question arises from the following circumstances.

Petitioner, a native and citizen of China, evidently entered the United States in 1965 as a seaman.[2] The terms of his entry permitted him to remain in this country for the period during which his vessel was in port, provided that this did not exceed 29 days. See 8 U. S. C. § 1282 (a).[3] He deserted his vessel, and remained unlawfully in the United States. After petitioner's eventual apprehension, deportation proceedings were conducted by a special inquiry officer under the authority of § 242 (b). Petitioner conceded his deportability, but sought and obtained permission to depart the United States voluntarily.[4] Despite his protestations of good faith, petitioner did not voluntarily depart, and was ultimately ordered to surrender for deportation. He then requested a stay of deportation from a district director of immigration, pending the submission and disposition of an application for adjustment of status under 8 U. S. C. § 1153 (a)(7) (1964 ed., Supp. II).[5] The district director

[1] We emphasize that no questions are presented as to petitioner's deportability or as to the propriety in his situation of any discretionary relief. We intimate no views on any such questions.

[2] The facts concerning petitioner's entry into, and subsequent stay in, the United States appear to have been conceded in the proceeding before the special inquiry officer.

[3] Section 1282 (a) provides in relevant part that "(a) No alien crewman shall be permitted to land temporarily in the United States except . . . for a period of time, in any event, not to exceed—(1) the period of time (not exceeding twenty-nine days) during which the vessel . . . remains in port . . . ."

[4] We note, as we did in *Foti* v. *Immigration Service*, 375 U. S. 217, that the "granting of voluntary departure relief does not result in the alien's not being subject to an outstanding final order of deportation." *Id.*, at 219, n. 1.

[5] Section 1153 (a)(7) (1964 ed., Supp. II) provides in part that "[c]onditional entries shall next be made available . . . to aliens who

concluded that petitioner is ineligible for such an adjustment of status, and denied a stay of deportation.

Petitioner thereupon commenced these proceedings in the Court of Appeals for the Third Circuit, petitioning for review of the denial of a stay. The Court of Appeals held that the provisions of § 106 (a), under which it would otherwise have exclusive jurisdiction to review the district director's order, are inapplicable to orders denying ancillary relief unless those orders either are entered in the course of a proceeding conducted under § 242 (b), or are denials of motions to reopen such proceedings. The court dismissed the petition for want of jurisdiction. 381 F. 2d 542. We granted certiorari because the courts of appeals have disagreed as to the proper construction of the pertinent statutory provisions.[6] 390 U. S. 918. For reasons that follow, we affirm.

I.

It is useful first to summarize the relevant provisions of the Immigration and Nationality Act and of the regulations promulgated under the Act's authority. Sec-

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satisfy an Immigration and Naturalization Service officer . . . that (i) because of persecution or fear of persecution . . . they have fled . . . from any Communist or Communist-dominated country . . . ." Conditional entries are available only to refugees, and, like the parole system, grant "temporary harborage in this country for humane considerations or for reasons rooted in public interest." C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.54 (1967). See also *id.*, at § 2.27h.

[6] Compare the following: *Skiftos* v. *Immigration & Naturalization Service*, 332 F. 2d 203 (C. A. 7th Cir.); *Talavera* v. *Pederson*, 334 F. 2d 52 (C. A. 6th Cir.); *Samala* v. *Immigration & Naturalization Service*, 336 F. 2d 7 (C. A. 5th Cir.); *Mendez* v. *Major*, 340 F. 2d 128 (C. A. 8th Cir.); *Melone* v. *Immigration & Naturalization Service*, 355 F. 2d 533 (C. A. 7th Cir.); *Mui* v. *Esperdy*, 371 F. 2d 772 (C. A. 2d Cir.); *Yamada* v. *Immigration & Naturalization Service*, 384 F. 2d 214 (C. A. 9th Cir.); *De Lucia* v. *Attorney General*, — U. S. App. D. C. —, — F. 2d —.

tion 242 (b) provides a detailed administrative procedure for determining whether an alien may be deported. It permits the entry of an order of deportation only upon the basis of a record made in a proceeding before a special inquiry officer, at which the alien is assured rights to counsel, to a reasonable opportunity to examine the evidence against him, to cross-examine witnesses, and to present evidence in his own behalf. By regulation, various forms of discretionary relief may also be sought from the special inquiry officer in the course of the deportation proceeding; an alien may, for example, request that his deportation be temporarily withheld, on the ground that he might, in the country to which he is to be deported, "be subject to persecution . . . ." See 8 U. S. C. § 1253 (h) (1964 ed., Supp. II); 8 CFR § 242.8 (a).

Other forms of discretionary relief may be requested after termination of the deportation proceeding. The regulations thus provide that an alien "under a final administrative order of deportation" may apply to the district director "having jurisdiction over the place where the alien is at the time of filing" for a stay of deportation. 8 CFR § 243.4. The stay may be granted by the district director "in his discretion." *Ibid.* If the stay is denied, the denial "is not appealable" to the Board of Immigration Appeals. *Ibid.*

Section 106 (a)[7] provides that the procedures for judicial review prescribed by the Hobbs Act, 64 Stat. 1129, 68 Stat. 961, "shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens . . . pursuant to administrative proceedings under section 242 (b) of this Act . . . ." These procedures

[7] Section 106 (a), 8 U. S. C. § 1105a (a), was added to the Immigration and Nationality Act by § 5 (a) of Public Law 87–301, approved September 26, 1961, 75 Stat. 651.

vest in the courts of appeals exclusive jurisdiction to review final orders issued by specified federal agencies. In situations to which the provisions of § 106 (a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court.

The positions of the various parties may be summarized as follows. We are urged by both petitioner and the Immigration Service to hold that the provisions of § 106 (a) are applicable to the circumstances presented by this case, and that judicial review thus is available only in the courts of appeals. The Immigration Service contends that § 106 (a) should be understood to embrace all determinations "directly affecting the execution of the basic deportation order," whether those determinations have been reached prior to, during, or subsequent to the deportation proceeding.[8] In contrast, *amicus*[9] urges, as the Court of Appeals held, that § 106 (a) encompasses only those orders made in the course of a proceeding conducted under § 242 (b) or issued upon motions to reopen such proceedings.

II.

This is the third case in which we have had occasion to examine the effect of § 106 (a). In the first, *Foti* v. *Immigration Service*, 375 U. S. 217, the petitioner, in the course of a proceeding conducted under § 242 (b), conceded his deportability but requested a suspension of deportation under § 244 (a)(5). The special inquiry officer denied such a suspension, and petitioner's appeal from the

[8] Brief for Respondent 28.

[9] Since the Immigration Service had aligned itself with petitioner on this question, the Court invited William H. Dempsey, Jr., Esquire, a member of the Bar of this Court, to appear and present oral argument as *amicus curiae* in support of the judgment below. 390 U. S. 918.

denial was dismissed by the Board of Immigration Appeals. Petitioner commenced an action in the district court, but the action was dismissed on the ground that, under § 106 (a), his exclusive remedy lay in the courts of appeals. He then petitioned for review to the Court of Appeals for the Second Circuit, but it dismissed for want of jurisdiction. A divided court held *en banc* that the procedures of § 106 (a) were inapplicable to denials of discretionary relief under § 244 (a)(5). 308 F. 2d 779. On certiorari, we reversed, holding that "all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals . . . are . . . included within the ambit of the exclusive jurisdiction of the Court of Appeals under § 106 (a)." 375 U. S., at 229.

In the second case, *Giova* v. *Rosenberg,* 379 U. S. 18, petitioner moved before the Board of Immigration Appeals to reopen proceedings, previously conducted under § 242 (b), that had terminated in an order for his deportation. The Board denied relief. The Court of Appeals for the Ninth Circuit concluded that the Board's denial was not embraced by § 106 (a), and dismissed the petition for want of jurisdiction. 308 F. 2d 347. On certiorari, this Court held, in a brief *per curiam* opinion, that such orders were within the exclusive jurisdiction of the courts of appeals.

Although *Foti* strongly suggests the result that we reach today, neither it nor *Giova* can properly be regarded as controlling in this situation. Unlike the order in *Foti,* the order in this case was not entered in the course of a proceeding conducted by a special inquiry officer under § 242 (b); unlike the order in *Giova,* the order here did not deny a motion to reopen such a proceeding. We regard the issue of statutory construction involved here as markedly closer than the questions pre-

sented in those cases; at the least, it is plainly an isssue upon which differing views may readily be entertained. In these circumstances, it is imperative, if we are accurately to implement Congress' purposes, to "seiz[e] every thing from which aid can be derived." *Fisher* v. *Blight*, 2 Cranch 358, 386.

It is important, first, to emphasize the character of the statute with which we are concerned. Section 106 (a) is intended exclusively to prescribe and regulate a portion of the jurisdiction of the federal courts. As a jurisdictional statute, it must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes. *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44. Further, as a statute addressed entirely to "specialists," it must, as Mr. Justice Frankfurter observed, "be read by judges with the minds of . . . specialists." [10]

We cannot, upon close reading, easily reconcile the position urged by the Immigration Service with the terms of § 106 (a). A denial by a district director of a stay of deportation is not literally a "final order of deportation," nor is it, as was the order in *Foti*, entered in the course of administrative proceedings conducted under § 242 (b).[11] Thus, the order in this case was issued more

[10] Frankfurter, Some Reflections on the Reading of Statutes, 2 Record of N. Y. C. B. A. 213, 225.

[11] We find the emphasis placed in dissent upon the word "pursuant" in § 106 (a) unpersuasive. First, § 106 (a) was evidently limited to those final orders of deportation made "pursuant to administrative proceedings under section 242 (b)" simply because Congress preferred to exclude from it those deportation orders entered without a § 242 (b) proceeding. This would, for example, place orders issued under 8 U. S. C. § 1282 (b), by which the Immigration Service may revoke a seaman's conditional permit to land and deport him, outside the judicial review procedures of § 106 (a). See generally C. Gordon & H. Rosenfield, Immigration Law and Procedure § 5.11

than three months after the entry of the final order of deportation,[12] in proceedings entirely distinct from those conducted under § 242 (b), by an officer other than the special inquiry officer who, as required by § 242 (b), presided over the deportation proceeding. The order here did not involve the denial of a motion to reopen proceedings conducted under § 242 (b), or to reconsider any final order of deportation. Concededly, the application for a stay assumed the prior existence of an order of deportation, but petitioner did not "attack the deportation order itself but instead [sought] relief not inconsistent with it." *Mui* v. *Esperdy*, 371 F. 2d 772, 777. If, as the Immigration Service urges, § 106 (a) embraces all determinations "directly affecting the execution of" a final deportation order, Congress has selected language remarkably inapposite for its purpose. As Judge Friendly observed in a similar case, if "Congress had

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(1967). Perhaps this suggests, as *amicus* urges, that § 106 (a) was intended to be limited to situations in which quasi-judicial proceedings, such as those under § 242 (b), have been conducted. It certainly indicates that the reference in § 106 (a) to § 242 (b) proceedings was intended to limit, and not to broaden, the classes of orders to which § 106 (a) may be applied. Second, it must be reiterated that § 106 (a) does not, as the dissenting opinion suggests, encompass "all orders" entered pursuant to § 242 (b) proceedings; it is limited to "final orders of deportation." The textual difficulty, with which the dissenting opinion does not deal, is that the order in question here neither is a final order of deportation, nor is it, as was the order in *Foti*, "made during the same proceedings" in which a final order of deportation has been issued. 375 U. S., at 224. This cannot be overcome merely by examination of the meaning of the word "pursuant."

[12] The special inquiry officer's decision, which established deportability and granted voluntary departure, was issued on March 3, 1966. Petitioner filed his application for a stay on June 20, 1966. The application was evidently denied on the same day.

wanted to go that far, presumably it would have known how to say so." *Ibid.*

The legislative history of § 106 (a) does not strengthen the position of the Immigration Service. The "basic purpose" of the procedural portions of the 1961 legislation was, as we stated in *Foti*, evidently "to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts . . . ." 375 U. S., at 226. Congress prescribed for this purpose several procedural innovations, among them the device of direct petitions for review to the courts of appeals. Although, as the Immigration Service has emphasized, the broad purposes of the legislation might have been expected to encompass orders denying discretionary relief entered outside § 242 (b) proceedings, there is evidence that Congress deliberately restricted the application of § 106 (a) to orders made in the course of proceedings conducted under § 242 (b).

Thus, during a colloquy on the floor of the House of Representatives, to which we referred in *Foti*,[13] Representative Moore, co-sponsor of the bill then under discussion, suggested that any difficulties resulting from the separate consideration of deportability and of discretionary relief could be overcome by "a change in the present administrative practice of considering the issues . . . piecemeal. There is no reason why the Immigration Service could not change its regulations to permit contemporaneous court consideration of deportability and administrative application for relief." 105 Cong. Rec. 12728. In the same colloquy, Representative Walter, the chairman of the subcommittee that conducted the pertinent hearings, recognized that certain forms of discretionary relief may be requested in the course of a

[13] See 375 U. S., at 223–224.

deportation proceeding, and stated that § 106 (a) would apply to the disposition of such requests, "just as it would apply to any other issue *brought up in deportation proceedings.*" 105 Cong. Rec. 12728 (emphasis added). Similarly, Representative Walter, in a subsequent debate, responded to a charge that judicial review under § 106 (a) would prove inadequate because of the absence of a suitable record, by inviting "the gentleman's attention to the law in section 242, in which the procedure for the examiner is set forth in detail." 107 Cong. Rec. 12179.

We believe that, in combination with the terms of § 106 (a) itself, these statements lead to the inference that Congress quite deliberately restricted the application of § 106 (a) to orders entered during proceedings conducted under § 242 (b), or directly challenging deportation orders themselves.[14] This is concededly "a choice between uncertainties," but we are "content to choose the lesser." *Burnet* v. *Guggenheim,* 288 U. S. 280, 288.

We need not speculate as to Congress' purposes. Quite possibly, as Judge Browning has persuasively suggested, "Congress visualized a single administrative proceeding in which all questions relating to an alien's deportation would be raised and resolved, followed by a single petition in a court of appeals for judicial review . . . ." *Yamada* v. *Immigration & Naturalization Service,* 384 F. 2d 214, 218. It may therefore be that Congress expected the Immigration Service to include within the § 242 (b) proceeding "all issues which might affect deportation." *Ibid.* Possibly, as *amicus* cogently urges, Congress wished to limit petitions to the courts of

[14] The Immigration Service has argued that the limiting language in § 106 (a) may be explained by Congress' wish to restrict its application to deportation cases, preventing its application to questions arising from exclusion proceedings. We have found nothing in the pertinent legislative history that offers meaningful support to this view.

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appeals to situations in which quasi-judicial hearings had been conducted.[15] It is enough to emphasize that neither of these purposes would be in any fashion impeded by the result we reach today. We hold that the judicial review provisions of § 106 (a) embrace only those determinations made during a proceeding conducted under § 242 (b), including those determinations made incident to a motion to reopen such proceedings.[16]

This result is entirely consistent with our opinion in *Foti*. There, it was repeatedly stated in the opinion of THE CHIEF JUSTICE that the order held reviewable under § 106 (a) had, as the regulations required, been entered in the course of a proceeding conducted under § 242 (b). 375 U. S., at 218, 222–223, 224, 226, 228, 229, 232. It was emphasized that "the administrative discretion to grant a suspension of deportation," the determination involved in *Foti*, "has historically been consistently exercised as an integral part of the proceedings which have led to the issuance of a final deportation order." *Id.*, at 223. A suspension of deportation "must be requested prior to or during the deportation hearing." *Ibid.* Moreover, it was explicitly recognized that, although modification of the pertinent regulations might "effectively broaden or narrow the scope of review available in the Courts of Appeals," this was "nothing anomalous." [17]

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[15] Note, *e. g.*, the apparent exclusion from § 106 (a) of orders entered under 8 U. S. C. § 1282 (b). See generally *supra*, n. 11.

[16] We intimate no views on the possibility that a court of appeals might have "pendent jurisdiction" over denials of discretionary relief, where it already has before it a petition for review from a proceeding conducted under § 242 (b). See *Foti* v. *Immigration Service*, *supra*, at 227, n. 14.

[17] The opinion of the Court emphasized, in addition, that "[c]learly, changes in administrative procedures may affect the scope and content of various types of agency orders and thus the subject matter embraced in a judicial proceeding to review such orders." *Id.*, at 230, n. 16.

Id., at 229–230. An essential premise of *Foti* was thus that the application of § 106 (a) had been limited to orders "made during the same proceedings in which deportability is determined . . . ." *Id.*, at 224.

The *per curiam* opinion in *Giova* did not take a wider view of § 106 (a). The denial of an application to reopen a deportation proceeding is readily distinguishable from a denial of a stay of deportation, in which there is no attack upon the deportation order or upon the proceeding in which it was entered. Petitions to reopen, like motions for rehearing or reconsideration, are, as the Immigration Service urged in *Foti*, "intimately and immediately associated" with the final orders they seek to challenge.[18] Thus, petitions to reopen deportation proceedings are governed by the regulations applicable to the deportation proceeding itself, and, indeed, are ordinarily presented for disposition to the special inquiry officer who entered the deportation order.[19] The result in *Giova* was thus a logical concomitant of the construction of § 106 (a) reached in *Foti;* it did not, explicitly or by implication, broaden that construction in any fashion that encompasses this situation.

The result we reach today will doubtless mean that, on occasion, the review of denials of discretionary relief will be conducted separately from the review of an order of deportation involving the same alien. Nonetheless, this does not seem an onerous burden, nor is it one that cannot be avoided, at least in large part, by appropriate action of the Immigration Service itself. More impor-

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[18] Brief for Respondent, No. 28, October Term 1963, at 53.

[19] See 8 CFR § 242.22. If, however, the order of the special inquiry officer is appealed to the Board of Immigration Appeals, a subsequent motion to reopen or reconsider is presented to the Board for disposition. *Ibid.* The motion in *Giova* was presented to the Board and decided by it.

tant, although "there is no table of logarithms for statutory construction," [20] it is the result that we believe most consistent both with Congress' intentions and with the terms by which it has chosen to express those intentions.

Affirmed.

MR. JUSTICE WHITE, dissenting.

If the special inquiry officer had possessed jurisdiction to issue a stay order pending petitioner's efforts to obtain discretionary relief from the District Director, I take it that his denial of the stay, like a refusal to re-open, would have been appealable to the Court of Appeals. But, as I understand it, no stay could have been granted by the hearing officer and it was sought from the District Director as an immediate consequence of there being outstanding a final order of deportation, which, if executed, might moot the underlying request for relief from the District Director. Section 106 does not limit judicial review in the Court of Appeals to orders entered "in the course of" § 242 (b) proceedings, but extends it to all orders against aliens entered "pursuant" to such proceedings, that is, at least as Webster would have it,* "acting or done in consequence" of the § 242 (b) proceedings. Except for the order of deportation, there would have been no occasion or need to seek a stay. It hardly strains congressional intention to give the word "pursuant" its ordinary meaning in the English language. If there are reasons based on policy for the Court's contrary conclusion, they are not stated. I would reverse the judgment.

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[20] Frankfurter, Some Reflections on the Reading of Statutes, *supra*, at 234.

* Merriam-Webster, Webster's New International Dictionary, Second Edition, unabridged (1957), defines "pursuant" as:

"1. Acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according . . . .

"2. That is in pursuit or pursuing . . . ."

HARRISON *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 876. Argued April 4, 1968.—Decided June 10, 1968.

At petitioner's trial for murder, the prosecution introduced three in-custody confessions in which petitioner allegedly admitted the shotgun slaying of a man whom petitioner and two others had intended to rob. Following the admission of those confessions into evidence, petitioner (whose counsel's opening statement to the jury had announced that petitioner would not testify) took the stand. He testified that he and two companions had gone to the victim's house hoping to pawn a shotgun which accidentally killed the victim while petitioner was presenting it to him for inspection. Petitioner was found guilty but the Court of Appeals reversed on the ground that his confessions had been illegally obtained and were hence inadmissible. On retrial, the prosecutor read to the jury petitioner's previous trial testimony (placing petitioner, shotgun in hand, at the scene of the killing), which was admitted into evidence over petitioner's objection that he had been induced to testify at the prior trial only because of the introduction against him of the inadmissible confessions. Petitioner was again convicted, and the Court of Appeals affirmed, relying on the fact that petitioner "made a conscious tactical decision to seek acquittal by taking the stand after [his] in-custody statements had been let in . . . ." *Held:* Petitioner's testimony at the former trial was inadmissible in the later proceeding because it was the fruit of the illegally procured confessions. Pp. 222–226.

(a) The same principle that prohibits the use of illegally obtained confessions likewise prohibits the use of any testimony impelled thereby, and if petitioner decided to testify in order to overcome the impact of those confessions, the testimony he gave was tainted by the same illegality that rendered the confessions themselves inadmissible. Pp. 222–224.

(b) Having illegally placed petitioner's confessions before the jury in the first place, the Government cannot demand that petitioner demonstrate that he would not have testified as he did if his inadmissible confessions had not been used; instead the Government must show that its illegal action did not induce petitioner's testimony, and no such showing was made here. Pp. 224–225.

(c) Even if petitioner would have decided to testify in any event, the natural inference, which the Government has not dispelled, is that he would not have made the damaging admission he did make on the witness stand had his confessions not already been spread before the jury. Pp. 225–226.

128 U. S. App. D. C. 245, 387 F. 2d 203, reversed.

Alfred V. J. Prather, by appointment of the Court, 389 U. S. 1002, argued the cause and filed briefs for petitioner.

Francis X. Beytagh, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was brought to trial before a jury in the District of Columbia upon a charge of felony murder.[1] At that trial the prosecution introduced three confessions allegedly made by the petitioner while he was in the custody of the police. After these confessions had been admitted in evidence, the petitioner took the witness stand and testified to his own version of the events leading to the victim's death. The jury found the petitioner guilty, but the Court of Appeals reversed his conviction, holding that the petitioner's confessions had been illegally obtained and were therefore inadmissible in evidence against him. *Harrison* v. *United States,* 123 U. S. App. D. C. 230, 238, 359 F. 2d 214, 222; on rehearing *en banc,* 123 U. S. App. D. C. 239, 359 F. 2d 223.[2]

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[1] An earlier conviction had been vacated on appeal. See n. 4, *infra.*

[2] Two of the confessions were found to have been obtained in violation of *Mallory* v. *United States,* 354 U. S. 449. The third was found to have been obtained in violation of a prior *en banc* decision of the Court of Appeals, *Harling* v. *United States,* 111 U. S. App. D. C. 174, 295 F. 2d 161. See n. 6, *infra.*

The substance of the confessions was that the petitioner and two others, armed with a shotgun, had gone to the victim's house intending to rob him, and that the victim had been killed while resisting their entry into his home. In his testimony at trial the petitioner said that he and his companions had gone to the victim's home hoping to pawn the shotgun, and that the victim was accidentally killed while the petitioner was presenting the gun to him for inspection.

Upon remand, the case again came to trial before a jury. This time the prosecutor did not, of course, offer the alleged confessions in evidence. But he did read to the jury the petitioner's testimony at the prior trial—testimony which placed the petitioner, shotgun in hand, at the scene of the killing. The testimony was read over the objection of defense counsel, who argued that the petitioner had been induced to testify at the former trial only because of the introduction against him of the inadmissible confessions. The petitioner was again convicted, and the Court of Appeals affirmed.[3] We granted certiorari to decide whether the petitioner's trial testimony was the inadmissible fruit of the illegally procured confessions.[4]

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[3] 128 U. S. App. D. C. 245, 387 F. 2d 203.

[4] 389 U. S. 969. The petitioner's further contention that he was denied the right to a speedy trial is wholly without merit and was properly rejected by the Court of Appeals. See 128 U. S. App. D. C., at 248–250, 387 F. 2d, at 206–208. The petitioner was indicted more than eight years ago and has been tried and convicted three times for the offense here involved. His first conviction was vacated on appeal when it became clear that the man who had represented him in certain post-verdict proceedings was an ex-convict posing as an attorney, see 123 U. S. App. D. C. 230, 232–233, 359 F. 2d 214, 216–217; his second conviction was reversed because the Government employed inadmissible confessions against him on retrial, see 123 U. S. App. D. C. 230, 238, 239, 359 F. 2d 214, 222, 223; and his third conviction is presently before us. Virtually all of the delays of which the petitioner complains occurred in the

In this case we need not and do not question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings.[5] A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.

Here, however, the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained,[6] and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor. For the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392.[7]

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course of appellate proceedings and resulted either from the actions of the petitioner or from the need to assure careful review of an unusually complex case.

[5] See, *e. g., Edmonds* v. *United States,* 106 U. S. App. D. C. 373, 377–378, 273 F. 2d 108, 112–113; *Ayres* v. *United States,* 193 F. 2d 739, 740–741. And see generally C. McCormick, Evidence §§ 131, 230–235, 239 (1954).

[6] In the present posture of this case, the earlier holding of the Court of Appeals that the petitioner's confessions were illegally obtained, see 123 U. S. App. D. C. 230, 238, 239, 359 F. 2d 214, 222, 223, is not in dispute. We therefore proceed upon the assumption that the Court of Appeals was correct in ruling the confessions inadmissible, but we intimate no view upon how we would evaluate that ruling if it were properly before us.

[7] See also *Nardone* v. *United States,* 308 U. S. 338, 341; *Wong Sun* v. *United States,* 371 U. S. 471, 484–488. Cf. *Fahy* v. *Connecticut,*

In concluding that the petitioner's prior testimony could be used against him without regard to the confessions that had been introduced in evidence before he testified, the Court of Appeals relied on the fact that the petitioner had "made a conscious tactical decision to seek acquittal by taking the stand after [his] in-custody statements had been let in . . . ." [8] But that observation is beside the point. The question is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.[9] As Justice Tobriner wrote for the Supreme Court of California,

> "If the improper use of [a] defendant's extrajudicial confession impelled his testimonial admission of guilt, . . . we could not, in order to shield

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375 U. S. 85, 91. See also the opinions of Chief Justice Traynor in *People* v. *Jackson*, 67 Cal. 2d 96, 97, 429 P. 2d 600, 603, and *People* v. *Polk*, 63 Cal. 2d 443, 449, 406 P. 2d 641, 644, and the opinions of Justice Tobriner in *People* v. *Spencer*, 66 Cal. 2d 158, 164–169, 424 P. 2d 715, 719–724, and *People* v. *Bilderbach*, 62 Cal. 2d 757, 763–768, 401 P. 2d 921, 924–927.

[8] 128 U. S. App. D. C. 245, 252, 387 F. 2d 203, 210.

[9] We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused is challenged as "the evidentiary product of the poisoned tree." R. Ruffin, Out on a Limb of the Poisonous Tree: The Tainted Witness, 15 U. C. L. A. Law Rev. 32, 44 (1967). See also Comment, Fruit of the Poisonous Tree—A Plea for Relevant Criteria, 115 U. Pa. L. Rev. 1136, 1143–1153 (1967). Compare *United States* v. *Wade*, 388 U. S. 218, 241; *Gilbert* v. *California*, 388 U. S. 263, 272–273. And, contrary to the suggestion made in a dissenting opinion today, *post*, at 234, we decide here only a case in which the prosecution illegally introduced the defendant's confession in evidence against him at trial in its case-in-chief.

> the resulting conviction from reversal, separate what he told the jury on the witness stand from what he confessed to the police during interrogation." [10]

The remaining question is whether the petitioner's trial testimony was in fact impelled by the prosecution's wrongful use of his illegally obtained confessions. It is, of course, difficult to unravel the many considerations that might have led the petitioner to take the witness stand at his former trial. But, having illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. "The springs of conduct are subtle and varied," Mr. Justice Cardozo once observed. "One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all

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[10] *People* v. *Spencer, supra,* 66 Cal. 2d, at 164, 424 P. 2d, at 719–720.

It is argued in dissent that the petitioner's trial testimony should not be suppressed "even if it was in fact induced by the wrongful admission into evidence of an illegal confession," *post,* at 232, since any deterrence such suppression might achieve is insufficient to warrant placing new "obstacles . . . in the path of policeman, prosecutor, and trial judge alike." *Post,* at 235. Of course, no empirical evidence on the deterrence issue is available. And "[s]ince as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled." *Elkins* v. *United States,* 364 U. S. 206, 218. But it is not deterrence alone that warrants the exclusion of evidence illegally obtained—it is "the imperative of judicial integrity." *Id.,* at 222. The exclusion of an illegally procured confession and of any testimony obtained in its wake deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime. On the contrary, the exclusion of evidence causally linked to the Government's illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law.

others." [11] Having "released the spring" by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.[12]

No such showing has been made here. In his opening statement to the jury, defense counsel announced that the petitioner would not testify in his own behalf. Only after his confessions had been admitted in evidence did he take the stand. It thus appears that, but for the use of his confessions, the petitioner might not have testified at all.[13] But even if the petitioner would have decided to testify whether or not his confessions had been used, it does not follow that he would have admitted being at the scene of the crime and holding the gun when the fatal shot was fired. On the contrary, the more natural inference is that no testimonial admission so damaging would have been made if the prosecutor had not already

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[11] *De Cicco* v. *Schweizer*, 221 N. Y. 431, 438, 117 N. E. 807, 810.

[12] See *People* v. *Spencer, supra*, 66 Cal. 2d, at 168, 424 P. 2d, at 722. As MR. JUSTICE HARLAN recently observed, "when the prosecution seeks to use a confession uttered after an earlier one not found to be voluntary, it has . . . the burden of proving . . . that the later confession . . . was not directly produced by the existence of the earlier confession." *Darwin* v. *Connecticut*, 391 U. S. 346, 351 (concurring in part and dissenting in part). The same principle compels the conclusion that, when the prosecution seeks to use testimony given after the introduction in evidence of a confession unlawfully obtained, it has the burden of proving that the defendant's testimony was not produced by the illegal use of his confession at trial. Compare *Chapman* v. *California*, 386 U. S. 18, 24: "Certainly error . . . in illegally admitting highly prejudicial evidence . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless."

[13] "In evaluating the possibility that the erroneous introduction of [a] defendant's extrajudicial confession might have induced his subsequent testimonial confession, we must assess [the] defendant's reaction to the use of his confession at trial on the basis of the information then available to him . . . ." *People* v. *Spencer, supra*, 66 Cal. 2d, at 165, 424 P. 2d, at 720.

spread the petitioner's confessions before the jury.[14] That is an inference the Government has not dispelled.

It has not been demonstrated, therefore, that the petitioner's testimony was obtained "by means sufficiently distinguishable" from the underlying illegality "to be purged of the primary taint." *Wong Sun* v. *United States*, 371 U. S. 471, 488. Accordingly, the judgment must be

Reversed.

MR. JUSTICE BLACK, dissenting.

It seems to me that the Court in this case carries the Court-made doctrine of excluding evidence that is "fruit of the poisonous tree" to a wholly illogical and completely unreasonable extent. For this and many of the reasons suggested by my Brother WHITE's dissent, I agree that holdings like this make it far more difficult to protect society "against those who have made it impossible to live today in safety." I would *affirm* this conviction.

MR. JUSTICE HARLAN, dissenting.

Like my Brother BLACK and my Brother WHITE, I am unable to understand why the Court reverses this petitioner's conviction. There is no suggestion that the testimony in question, given on the stand with the

[14] Compare *United States* v. *Bayer*, 331 U. S. 532: "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first." *Id.*, at 540 (dictum). Compare also *Darwin* v. *Connecticut*, *supra*, 391 U. S. 346, 349; *id.*, at 350–351 (separate opinion of MR. JUSTICE HARLAN); *Beecher* v. *Alabama*, 389 U. S. 35, 36, n. 2; *Clewis* v. *Texas*, 386 U. S. 707, 710.

advice of counsel, was somehow unreliable. Nor, as the opinion of MR. JUSTICE WHITE amply demonstrates, is there any plausible argument that a rule excluding such evidence from use at a later trial adds an ounce of deterrence against police violation of the *Mallory* rule.

I do not doubt that "voluntariness" is not always a purely subjective question as to the defendant's state of mind; it may involve an objective analysis of the fairness of the situation in which government agents placed him. Nor would I rule out the possibility that a direct product of unlawful official activity might properly be excludable as a fruit of that activity—even where the product is so unforeseeable that a deterrent rationale for exclusion will not suffice—on the ground that the Government should not play an ignoble part.

But these concepts do not reach this case. Here, apparently in all good faith, the Government offered at one trial an out-of-court confession by petitioner. It was objected to on the ground that it had been obtained in violation of the *Mallory* rule. That objection was overruled, and the defense had to decide how to proceed. While defense counsel may have believed he had good grounds for reversal on appeal (as the Court of Appeals later held he did) he also had to present a defense in an effort to persuade the jury to acquit. That defense had of course to be structured to meet the Government's case as it stood—including but not limited to the admitted confession—and counsel decided to put his client on the stand.*

*This case is altogether different from *Darwin* v. *Connecticut*, 391 U. S. 346, 350, in which I took the position that when a first confession is involuntary a later confession produced by the erroneous impression that the cat was already out of the bag should also be considered involuntary. Here (1) petitioner's out-of-court confes-

The situation was one that criminal and civil defendants face all the time: believing that error has been committed that will result in reversal on appeal, they must nevertheless present a defense, and in doing so may help the other side on retrial. The situation here is no different in principle from the sacrifice of surprise, or the conveyance of important leads to the other side, that may occur because a trial continues even after error has been committed. It is a price that is paid for having a system of justice that insists, generally, upon full trials before appellate review of points of law. It is a problem that can be avoided, within our system, only by doing what is done here, namely, reaching the wrong result as between the litigants. For me this is not acceptable doctrine.

MR. JUSTICE WHITE, dissenting.

This case and others like it would be more comprehensible if they purported to make procedures for trying criminals more reliable for finding facts and minimizing mistakes. Cases like *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967); and *Bruton* v. *United States*, 391 U. S. 123 (1968), for example, at least could claim this redeeming virtue. But here, as in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), decision has emanated from the Court's fuzzy ideology about confessions, an ideology which is difficult to relate to any provision of the Constitution and which excludes from the trial evidence of the highest relevance and probity.

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sion was not involuntary; (2) petitioner's in-court statements were given upon the advice of counsel, and there is no indication whatever that petitioner misunderstood the position he was in; (3) the in-court testimony could not possibly have been thought merely cumulative of the confession, for it (a) was given in order to rebut the confession and (b) damaged petitioner's position in a manner quite independent of the use of the confession.

Three times petitioner has been convicted of murdering his robbery victim with a shotgun. The first trial was in 1960. At the second trial, in 1963, written and oral statements by petitioner and his codefendants were introduced. Petitioner then took the stand and gave his version of the events leading to the killing. He admitted being at the scene of the crime. Conviction followed. The Court of Appeals again reversed, this time on the ground that petitioner's statements were wrongfully admitted, not because they were involuntary or in any way coerced, but because they violated *Mallory* v. *United States,* 354 U. S. 449 (1957), and recent decisions of the Court of Appeals in *Killough* v. *United States,* 119 U. S. App. D. C. 10, 336 F. 2d 929 (1964), and *Harling* v. *United States,* 111 U. S. App. D. C. 174, 295 F. 2d 161 (1961). By the time of the third trial, in 1966, prosecution witnesses were dead or unavailable. Considerable reliance was placed on the testimony which had been given at the second trial, including petitioner's admissions when he took the stand in his own defense. Harrison was convicted for a third time. It is this conviction which the Court now reverses, contrary to the judgment of the Court of Appeals. That court found no reason to exclude petitioner's voluntary statements, made under oath in open court and with the advice of counsel.

There is no suggestion that petitioner's testimony at his second trial was untruthful or unreliable. Nor does the Court hold that Harrison was compelled to take the stand and incriminate himself contrary to his privilege under the Fifth Amendment. The reason is obvious. If a defendant were held to be illegally "compelled" when he takes the stand to counter strong evidence offered by the prosecution and admitted into evidence, he would be as much "compelled" whether it was error to admit the evidence or not. To avoid this absurd construction of the Self-Incrimination Clause, the Court casts about for

a different label. Harrison's testimony at the second trial, the Court now says, was not "compelled" but only "impelled" by the confessions. Alternatively it suggests that except for the confessions Harrison would not have taken the stand and admitted being at the scene of the crime. On either basis, his testimony at the second trial is deemed a fruit of illegally obtained confessions from which the Government should be permitted no benefit whatever. I disagree.

The doctrine that the "fruits" of illegally obtained evidence cannot be used to convict the defendant is complex and elusive. There are many unsettled questions under it. The Court, however, seems to overlook all of these problems in adopting an overly simple and mechanical notion of "fruits" to which I cannot subscribe. In the view of the Court, if some evidentiary matter is causally linked to some illegal activity of the Government—linked in that broad "but for" sense of causality which rarely excludes relevant matters which come later in time—it is a "fruit" and excludable as such. This strictly causal notion of fruits is, of course, consistent with the dictum in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392 (1920), that "[i]f knowledge of [the facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it . . . ." In *Silverthorne,* however, the "fruits" were copies and photographs of original documents illegally seized; it would be difficult to imagine a case where the fruits hung closer to the trunk of the poison tree. The Court seems to overlook the critical limitation placed upon the fruits doctrine in *Nardone* v. *United States,* 308 U. S. 338, 341 (1939), where Mr. Justice Frankfurter stated that:

> "Sophisticated argument may prove a causal connection between information obtained through illicit

> wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

Cf. *Wong Sun* v. *United States*, 371 U. S. 471, 487–488 (1963); *United States* v. *Wade*, 388 U. S. 218, 239–242 (1967). The concept implicit in the quoted statement, as I understand it, is that mere causal connection is insufficient to make something an inadmissible fruit. Rather it must be shown that suppression of the fruit would serve the same purpose as suppression of the illegal evidence itself. When one deals with the fruits of an illegal search or seizure, as in *Silverthorne*, or with the fruits of an illegal confession, as the Court decides that we do in this case,[1] the reason for suppression of the original illegal evidence itself is prophylactic—to deter the police from engaging in such conduct in the future by denying them its past benefits. See *Linkletter* v. *Walker*, 381 U. S. 618, 634–639 (1965). Since deterrence is the only justification for excluding the original evidence, there is no justification for excluding the fruits of such evidence unless suppression of them will also serve the prophylactic end. I deem this the crucial issue, and proper resolution of it requires a different result from that to which the Court has bulled its way.

As the Court makes plain, it is "difficult to unravel the many considerations that might have led the petitioner to take the witness stand . . . ." *Ante*, at 224. Given the difficulty of determining after the fact why the petitioner took the stand, it would seem patent that

[1] The essential predicate for excluding petitioner's testimony is the illegality of his confessions. That issue, seemingly a condition precedent to reversal, the Court avoids. It simply assumes, without deciding, both that the confessions were properly rejected by the Court of Appeals and that the prior decisions of the Court of Appeals in *Killough* and *Harling* were correctly decided. I would not reverse without reaching those questions.

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at the confession stage the police would be wholly without a basis for predicting whether the defendant would be more likely to waive his privilege against self-incrimination and take the stand if they were to obtain a confession than if they were not. Accordingly, it cannot realistically be supposed that the police are spurred on to greater illegality by any rational supposition that success in that illicit endeavor will make it more likely that the defendant will make incriminatory admissions on the witness stand. If this is the case, and I see no grounds for doubting that it is, then suppression of the petitioner's testimony, even if it was in fact induced by the wrongful admission into evidence of an illegal confession, does not remove a source of further temptation to the police to violate the Constitution.[2]

Even if it were true that the rule adopted by the Court served some minimal deterrent function, I would not be

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[2] "The purpose of depriving the government of any gain is to remove any incentive which exists toward the unlawful practice. The focus is forward—to prevent future violations, not punish for past ones. Consequently, where the chain between the challenged evidence and the primary illegality is long or the linkage can be shown only by 'sophisticated argument,' exclusion would seem inappropriate. In such a case it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus it could not have been a motivating force behind it. It follows that the threat of exclusion could not possibly operate as a deterrent in that situation. Absent this, exclusion carries with it no benefit to society and should not prejudice society's case against a criminal." Comment, Fruit of the Poisonous Tree—A Plea for Relevant Criteria, 115 U. Pa. L. Rev. 1136, 1148–1149 (1967). In the past the Court has shown greater appreciation of the significance of the deterrence element as well as of the causal element, for both must be present to present a substantial question for this Court. See *Smith* v. *United States*, 117 U. S. App. D. C. 1, 324 F. 2d 879 (1963), cert. denied, 377 U. S. 954 (1964); *Harlow* v. *United States*, 301 F. 2d 361 (C. A. 5th Cir.), cert. denied, 371 U. S. 814 (1962).

able to join the Court. Marginal considerations such as these, especially when one is dealing with confessions excludable because of violation of the technical requirements of cases like *Mallory* v. *United States,* 354 U. S. 449 (1957); *Massiah* v. *United States,* 377 U. S. 201 (1964); *Escobedo* v. *Illinois,* 378 U. S. 478 (1964); and *Miranda* v. *Arizona,* 384 U. S. 436 (1966), are insufficient to override the interest in presenting all evidence which is relevant and probative. When one adds the fact that in this case, as in most others where the issue will now arise, the defendant took the stand only upon advice of counsel, the argument for deterrence seems virtually to vanish altogether. Police now know that interrogation without warnings will void a confession, and the Federal Government at least is apprised that unduly long detention prior to arraignment will invalidate a confession obtained during the detention period. When this knowledge is coupled with their realization that a defendant's subsequent act of taking the stand to diminish the impact of an improperly admitted confession is guided by the advice of counsel, we have a situation in which the inducements to the police to refrain from illegality are already so clear and so strong that excluding testimony as the Court does in this case cannot conceivably be thought to decrease illegal conduct by the police. The police will know that if they fail to give warnings or if they detain the prisoner too long, any confession thus obtained will be unusable and that timely and effective objection to it will be taken as soon as the defendant acquires a lawyer. In such circumstances they could not reasonably believe that the confession will ever actually induce the defendant to take the witness stand. In short, the fact that the defendant has counsel who gives him specific advice deprives the Court's "fruits" argument of the last vestige of deterrence. Of course, in a situation where the illegality of the methods used to obtain the initial

evidence is open to doubt, as was true in this case, the fact that the defendant has counsel has little if any effect on the deterrence value of excluding the fruits. Even in such a case, however, I find the deterrence value of such exclusion too minimal. In any event it is clear that the deterrence value in such cases provides insufficient justification for the general rule which the Court adopts today.

I am deeply concerned about the implications of the Court's unexplained and unfounded decision. If Harrison's trial testimony was tainted evidence because induced by an illegal confession, then it follows, as the Court indicates by quoting from *People* v. *Spencer*, 66 Cal. 2d 158, 164, 424 P. 2d 715, 719 (1967), that Harrison's testimony would be automatically excluded even if the confessions had not been admitted. Similarly, an inadmissible confession preceding a plea of guilty would taint the plea. And, as a final consequence, today's decision would seem to bar the use of confessions defective under *Miranda* or *Mallory* from being used for impeachment when a defendant takes the stand and deliberately lies. All these results would seem to flow necessarily from the Court's adoption of a test for inadmissible fruits which relies only upon the existence of a causal link between the original evidence seized illegally and any subsequent product of it. Since precluding the prosecution from any of these uses will not serve the prophylactic end which alone justifies the exclusion of the original illegal evidence, and because all of these uses of evidence admittedly of relevance and high probative value are important to the overriding goal of criminal law—the just conviction of the guilty—I must dissent.

The Court compounds its substantive error today by the procedural ploy of switching the burden of proof to the prosecution. It rules that once it is shown that the defendant testified after inadmissible confessions were

used, "the Government must show that its illegal action did not induce his testimony." This despite the fact that the only person with actual knowledge of the subtle and varied "springs of conduct" which caused the defendant to take the stand is the defendant himself. This despite the fact that only five years ago this Court clearly affirmed the traditional rule that the defendant bears the burden of showing that the evidence complained of was an inadmissible fruit of illegality. *Fahy* v. *Connecticut*, 375 U. S. 85, 91 (1963). See *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). This switch in the burden can be justified only by the Court's misguided desire to exclude important evidence for which it has somehow acquired a constitutional distaste. Because I reject the end which the Court seeks to serve, I cannot endorse this naked manipulation of means to achieve that end.

Given the Court's current ideology about confessions, there is perhaps some logic on the side of the Court. But common sense and policy are squarely opposed. The important human values will not be served by the obstacles which the Court now places in the path of policeman, prosecutor, and trial judge alike. Criminal trials will simply become less effective in protecting society against those who have made it impossible to live today in safety.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 ET AL. *v.* ALLEN, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 660. Argued April 22, 1968.—Decided June 10, 1968.

New York's Education Law requires local public school authorities to lend textbooks free of charge to all students in grades seven to 12, including those in private schools. Appellant school boards sought a declaration that the statutory requirement was invalid as violative of the State and Federal Constitutions, an order barring appellee Commissioner of Education from removing appellants' members from office for failing to comply with it, and an order preventing the use of state funds for the purchase of textbooks to be lent to parochial students. The trial court held the law unconstitutional under the First and Fourteenth Amendments and entered summary judgment for appellants on the pleadings; the Appellate Division reversed and ordered the complaint dismissed since appellant school boards had no standing to attack the statute; and the New York Court of Appeals held that appellants did have standing but that the statute did not violate the State or Federal Constitution. The Court of Appeals said that the law was to benefit all school children, without regard to the type of school attended, that only textbooks approved by school authorities could be loaned, and therefore the statute was "completely neutral with respect to religion." *Held:* The statute does not violate the Establishment or the Free Exercise Clause of the First Amendment. Pp. 241–249.

(1) The express purpose of the statute was the furtherance of educational opportunities for the young, and the law merely makes available to all children the benefits of a general program to lend school books free of charge, and the financial benefit is to parents and children, not to schools. *Everson* v. *Board of Education*, 330 U. S. 1. Pp. 243–244.

(2) There is no evidence that religious books have been loaned, and it cannot be assumed that school authorities are unable to distinguish between secular and religious books or that they will not honestly discharge their duties to approve only secular books. Pp. 244–245.

(3) Parochial schools, in addition to their sectarian function, perform the task of secular education, and, on the basis of this meager record, the Court cannot agree with appellants that all teaching in a sectarian school is religious or that the intertwining of secular and religious training is such that secular textbooks furnished to students are in fact instrumental in teaching religion. Pp. 245–248.

(4) In the absence of specific evidence, and based solely on judicial notice, it cannot be concluded that the statute results in unconstitutional state involvement with religious instruction or violates the Establishment Clause. P. 248.

(5) Since appellants have not shown that the law coerces them in any way in the practice of religion, there is no violation of the Free Exercise Clause. Pp. 248–249.

20 N. Y. 2d 109, 228 N. E. 2d 791, affirmed.

Marvin E. Pollock argued the cause for appellants. With him on the brief was *Alan H. Levine.*

Jean M. Coon, Assistant Attorney General of New York, argued the cause for appellee Allen. With her on the brief were *Louis J. Lefkowitz,* Attorney General, and *Ruth Kessler Toch,* Solicitor General. *Porter R. Chandler* argued the cause for appellees Rock et al. With him on the brief were *William B. Ball, Richard E. Nolan,* and *James J. MacKrell.*

Briefs of *amici curiae,* urging reversal, were filed by *Leo Pfeffer, Arnold Forster, Edwin J. Lukas, Paul Hartman, Sol Rabkin,* and *Joseph B. Robison* for the American Jewish Committee et al., and by *Franklin C. Salisbury* for Protestants and Other Americans United for Separation of Church and State.

Briefs of *amici curiae,* urging affirmance, were filed by *Solicitor General Griswold, Assistant Attorney General Weisl, Lawrence G. Wallace, Alan S. Rosenthal,* and *Robert V. Zener* for the United States; by *Herbert F. DeSimone,* Attorney General of Rhode Island, *Charles G. Edwards,* Assistant Attorney General, *William C. Sen-*

nett, Attorney General of Pennsylvania, *James L. Oakes,* Attorney General of Vermont, *Robert C. Londerholm,* Attorney General of Kansas, *William B. Saxbe,* Attorney General of Ohio, and *Joe T. Patterson,* Attorney General of Mississippi; by *Jack P. F. Gremillion,* Attorney General, for the State of Louisiana; by *Boston E. Witt,* Attorney General, and *Myles E. Flint,* Assistant Attorney General, for the State of New Mexico; by *Ethan A. Hitchcock* for the National Association of Independent Schools, Inc.; by *R. Raber Taylor, Stuart D. Hubbell,* and *Herman Cahn* for Citizens for Educational Freedom; by *Edward C. Maguire* for the New York State AFL–CIO; by *Thomas J. Ford, Edward J. Walsh, Jr.,* and *George S. Eaton* for the Long Island Conference of Religious Elementary and Secondary School Administrators; by *Charles M. Whelan, W. R. Consedine, Alfred L. Scanlan,* and *Harmon Burns* for the National Catholic Educational Association et al.; by *Julius Berman* for the National Jewish Commission on Law and Public Affairs, and by *James P. Brown* for the Lutheran Church-Missouri Synod.

MR. JUSTICE WHITE delivered the opinion of the Court.

A law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools are included. This case presents the question whether this statute is a "law respecting an establishment of religion, or prohibiting the free exercise thereof," and so in conflict with the First and Fourteenth Amendments to the Constitution, because it authorizes the loan of textbooks to students attending parochial schools. We hold that the law is not in violation of the Constitution.

Until 1965, § 701 of the Education Law of the State of New York authorized public school boards to designate

textbooks for use in the public schools, to purchase such books with public funds, and to rent or sell the books to public school students.[1] In 1965 the Legislature amended § 701, basing the amendments on findings that the "public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." [2] Beginning with the 1966–1967 school year, local school boards were required to purchase textbooks and lend them without charge "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law." The books now loaned are "text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education," and which—according to a 1966 amendment—"a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends." [3]

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[1] New York Sess. Laws 1950, c. 239, § 1. New York Education Law § 703, New York Sess. Laws 1950, c. 239, § 3, permitted the qualified voters of any school district to authorize a special tax for the purpose of making available free textbooks. The 1965 amendments that required free textbooks to be provided for grades seven through 12 amended § 703 so that it now permits local voters to approve free books for grades one through six.

[2] New York Sess. Laws 1965, c. 320, § 1.

[3] New York Education Law § 701 (1967 Supp.):

"1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

"2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

"3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and

Appellant Board of Education of Central School District No. 1 in Rensselaer and Columbia Counties, brought suit in the New York courts against appellee James Allen.[4] The complaint alleged that § 701 violated both the State and Federal Constitutions; that if appellants, in reliance on their interpretation of the Constitution, failed to lend books to parochial school students within their counties appellee Allen would remove appellants from office; and that to prevent this, appellants were complying with the law and submitting to their constituents a school budget including funds for books to be lent to parochial school pupils. Appellants therefore sought a declaration that § 701 was invalid, an order barring appellee Allen from removing appellants from office for failing to comply with it, and another order restraining him from apportioning state funds to school districts for the purchase of textbooks to be lent to parochial students. After answer, and upon cross-motions for summary judgment, the trial court held the law un-

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to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

The present subdivision 2 was added by amendment in 1966, New York Sess. Laws 1966, c. 795. This suit was filed, and the trial court opinion was rendered, prior to the 1966 amendment.

[4] Intervention was permitted on plaintiffs' side by the Board of Education of Union Free School District No. 3 in Nassau County, which appears here as co-appellant, and on defendants' side by parents of certain students attending private schools, who appear here as co-appellees.

constitutional under the First and Fourteenth Amendments and entered judgment for appellants. 51 Misc. 2d 297, 273 N. Y. S. 2d 239 (1966). The Appellate Division reversed, ordering the complaint dismissed on the ground that appellant school boards had no standing to attack the validity of a state statute. 27 App. Div. 2d 69, 276 N. Y. S. 2d 234 (1966). On appeal, the New York Court of Appeals concluded by a 4–3 vote that appellants did have standing [5] but by a different 4–3 vote held that § 701 was not in violation of either the State or the Federal Constitution. 20 N. Y. 2d 109, 228 N. E. 2d 791, 281 N. Y. S. 2d 799 (1967). The Court of Appeals said that the law's purpose was to benefit all school children, regardless of the type of school they attended, and that only textbooks approved by public school authorities could be loaned. It therefore considered § 701 "completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends." Section 701, the Court of Appeals concluded, is not a law which "establishes a religion or constitutes the use of public funds to aid religious schools." 20 N. Y. 2d, at 117; 228 N. E. 2d, at 794, 795; 281 N. Y. S. 2d, at 805. We noted probable jurisdiction. 389 U. S. 1031 (1968).

Everson v. *Board of Education,* 330 U. S. 1 (1947), is the case decided by this Court that is most nearly in

[5] Appellees do not challenge the standing of appellants to press their claim in this Court. Appellants have taken an oath to support the United States Constitution. Believing § 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with § 701—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a "personal stake in the outcome" of this litigation. *Baker* v. *Carr,* 369 U. S. 186, 204 (1962).

point for today's problem. New Jersey reimbursed parents for expenses incurred in busing their children to parochial schools. The Court stated that the Establishment Clause bars a State from passing "laws which aid one religion, aid all religions, or prefer one religion over another," and bars too any "tax in any amount, large or small . . . levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U. S., at 15–16. Nevertheless, said the Court, the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation and does not prohibit "New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." The statute was held to be valid even though one of its results was that "children are helped to get to church schools" and "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets." 330 U. S., at 17. As with public provision of police and fire protection, sewage facilities, and streets and sidewalks, payment of bus fares was of some value to the religious school, but was nevertheless not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment.

Everson and later cases have shown that the line between state neutrality to religion and state support of religion is not easy to locate. "The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree." *Zorach* v. *Clauson*, 343 U. S. 306, 314 (1952). See *McGowan* v. *Maryland*, 366 U. S. 420 (1961). Based

on *Everson, Zorach, McGowan,* and other cases, *Abington School District* v. *Schempp,* 374 U. S. 203 (1963), fashioned a test subscribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson* v. *Board of Education.* . . ." 374 U. S., at 222.

This test is not easy to apply, but the citation of *Everson* by the *Schempp* Court to support its general standard made clear how the *Schempp* rule would be applied to the facts of *Everson.* The statute upheld in *Everson* would be considered a law having "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades. The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are fur-

nished to parochial schools, and the financial benefit is to parents and children, not to schools.[6] Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.

Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of § 701 does not authorize the loan of religious books, and the State claims no right to distribute religious literature. Although the books loaned are those required by the parochial school for use in specific courses, each book

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[6] While the record and the state court opinions in this case contained no information about how the books are in fact transferred from the Boards of Education to individual students, both parties suggested in their briefs and on oral argument before this Court that New York permits private schools to submit to boards of education summaries of the requests for textbooks filed by individual students, and also permits private schools to store on their premises the textbooks being loaned by the Board of Education to the students. This interpretation of the State's administrative procedure is supported by an "Opinion of Counsel" made available by the Board of Regents and the State Department of Education to local school superintendents. For purposes of this case we consider the New York statute to permit these procedures. So construing the statute, we find it in conformity with the Constitution, for the books are furnished for the use of individual students and at their request.

It should be noted that the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their students. There is some evidence that at least some of the schools did not: intervenor defendants asserted that they had previously purchased all their children's textbooks. And see statement of then Commissioner of Education Keppel: "Nonpublic schools rarely provide free textbooks." Hearings on Elementary and Secondary Education Act of 1965 before General Subcommittee on Education of House Committee on Education and Labor, 89th Cong., 1st Sess., Pt. 1, 93 (1965).

loaned must be approved by the public school authorities; only secular books may receive approval. The law was construed by the Court of Appeals of New York as "merely making available secular textbooks at the request of the individual student," *supra*, and the record contains no suggestion that religious books have been loaned. Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law. In judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.

The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However this Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), the Court held that although it would not question Oregon's power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance

laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.[7] Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with com-

[7] This Court has twice suggested the constitutionality of these state regulations. "[T]he State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.'" *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 631 (1943), quoting *Minersville School District* v. *Gobitis*, 310 U. S. 586, 604 (1940) (Stone, J., dissenting). "This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose." *Everson* v. *Board of Education*, 330 U. S. 1, 18 (1947) (citing *Pierce* v. *Society of Sisters*). A great many state cases have upheld a wide range of private school regulation. *E. g.*, *Meyerkorth* v. *State*, 173 Neb. 889, 115 N. W. 2d 585 (1962), appeal dismissed for want of a substantial federal question, 372 U. S. 705 (1963); *State* v. *Hoyt*, 84 N. H. 38, 146 A. 170 (1929); *People* v. *Donner*, 199 Misc. 643, 99 N. Y. S. 2d 830 (Dom. Rel. Ct. 1950), aff'd mem., 278 App. Div. 705, 103 N. Y. S. 2d 757, aff'd mem., 302 N. Y. 857, 100 N. E. 2d 48, appeal dismissed for want of a substantial federal question, 342 U. S. 884 (1951).

New York State regulates private schools extensively, especially as to attendance and curriculum. New York Education Law §§ 3201–3229 (1953). Regents examinations are given to private school students. *Id.*, § 209. The basic requirement is that the instruction given in private schools satisfying the compulsory attendance law be "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." *Id.*, § 3204 subd. 2.

New York requires school attendance of "each minor from seven to sixteen years of age" unless he has completed high school. *Id.*, § 3205.

pulsory education statutes.[8] These cases were a sensible corollary of *Pierce* v. *Society of Sisters:* if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function. Another corollary was *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370 (1930), where appellants said that a statute requiring school books to be furnished without charge to all students, whether they attended public or private schools, did not serve a "public purpose," and so offended the Fourteenth Amendment. Speaking through Chief Justice Hughes, the Court summarized as follows its conclusion that Louisiana's interest in the secular education being provided by private schools made provision of textbooks to students in those schools a properly public concern: "[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." 281 U. S., at 375.

Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests

[8] *E. g., People* v. *Turner,* 121 Cal. App. 2d 861, 263 P. 2d 685 (1953), appeal dismissed for want of a substantial federal question, 347 U. S. 972 (1954).

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that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students.[9] This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. This case comes to us after summary judgment entered on the pleadings. Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books. We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction or that § 701, for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.

Appellants also contend that § 701 offends the Free Exercise Clause of the First Amendment. However, "it is necessary in a free exercise case for one to show the

[9] In 1965–1966 in New York State, over 900,000 students, or 22.2% of total state enrollment, attended nonpublic schools. University of State of New York, Education Statistics Estimates 1966–67, Table I (1966). The comparable statistic for the Nation was at least 10%. United States Bureau of the Census, Statistical Abstract of the United States: 1967, at 111 (1967).

coercive effect of the enactment as it operates against him in the practice of his religion," *Abington School District* v. *Schempp,* 374 U. S. 203, 223 (1963), and appellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion.

The judgment is affirmed.

MR. JUSTICE HARLAN, concurring.

Although I join the opinion and judgment of the Court, I wish to emphasize certain of the principles which I believe to be central to the determination of this case, and which I think are implicit in the Court's decision.

The attitude of government toward religion must, as this Court has frequently observed, be one of neutrality. Neutrality is, however, a coat of many colors. It requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Abington School District* v. *Schempp,* 374 U. S. 203, 305 (concurring opinion of Goldberg, J.). Realization of these objectives entails "no simple and clear measure," *id.,* at 306, by which this or any case may readily be decided, but these objectives do suggest the principles which I believe to be applicable in the present circumstances. I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom," *id.,* at 307, it is not forbidden by the religious clauses of the First Amendment.

In my opinion, § 701 of the Education Law of New York does not employ religion as its standard for action or inaction, and is not otherwise inconsistent with these principles.

MR. JUSTICE BLACK, dissenting.

The Court here affirms a judgment of the New York Court of Appeals which sustained the constitutionality of a New York law providing state tax-raised funds to supply school books for use by pupils in schools owned and operated by religious sects. I believe the New York law held valid is a flat, flagrant, open violation of the First and Fourteenth Amendments which together forbid Congress or state legislatures to enact any law "respecting an establishment of religion." For that reason I would reverse the New York Court of Appeals' judgment. This, I am confident, would be in keeping with the deliberate statement we made in *Everson* v. *Board of Education*, 330 U. S. 1, 15–16 (1947), and repeated in *McCollum* v. *Board of Education*, 333 U. S. 203, 210–211 (1948), that:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious

> organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "

The *Everson* and *McCollum* cases plainly interpret the First and Fourteenth Amendments as protecting the taxpayers of a State from being compelled to pay taxes to their government to support the agencies of private religious organizations the taxpayers oppose. To authorize a State to tax its residents for such church purposes is to put the State squarely in the religious activities of certain religious groups that happen to be strong enough politically to write their own religious preferences and prejudices into the laws. This links state and churches together in controlling the lives and destinies of our citizenship—a citizenship composed of people of myriad religious faiths, some of them bitterly hostile to and completely intolerant of the others. It was to escape laws precisely like this that a large part of the Nation's early immigrants fled to this country. It was also to escape such laws and such consequences that the First Amendment was written in language strong and clear barring passage of any law "respecting an establishment of religion."

It is true, of course, that the New York law does not as yet formally adopt or establish a state religion. But it takes a great stride in that direction and coming events cast their shadows before them. The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion.[1] And it nearly always is

[1] See dissenting opinion of MR. JUSTICE DOUGLAS, *post*, p. 254.

by insidious approaches that the citadels of liberty are most successfully attacked.[2]

I know of no prior opinion of this Court upon which the majority here can rightfully rely to support its holding this New York law constitutional. In saying this, I am not unmindful of the fact that the New York Court of Appeals purported to follow *Everson* v. *Board of Education, supra,* in which this Court, in an opinion written by me, upheld a New Jersey law authorizing reimbursement to parents for the transportation of children attending sectarian schools. That law did not attempt to deny the benefit of its general terms to children of any faith going to any legally authorized school. Thus, it was treated in the same way as a general law paying the streetcar fare *of all school children,* or a law providing midday lunches for all children or all school children, or a law to provide police protection for children going to and from school, or general laws to provide police and fire protection for buildings, including, of course, churches and church school buildings as well as others.

As my Brother DOUGLAS so forcefully shows, in an argument with which I fully agree, upholding a State's power to pay bus or streetcar fares for school children cannot provide support for the validity of a state law using tax-raised funds to buy school books for a religious school. The First Amendment's bar to establishment of religion must preclude a State from using funds levied from all of its citizens to purchase books for use by sectarian schools, which, although "secular," realistically will in some way inevitably tend to propagate the religious views of the favored sect. Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit. In this sense it is not difficult

[2] See *Boyd* v. *United States,* 116 U. S. 616.

to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service. With respect to the former, state financial support actively and directly assists the teaching and propagation of sectarian religious viewpoints in clear conflict with the First Amendment's establishment bar; with respect to the latter, the State merely provides a general and nondiscriminatory transportation service in no way related to substantive religious views and beliefs.

This New York law, it may be said by some, makes but a small inroad and does not amount to complete state establishment of religion. But that is no excuse for upholding it. It requires no prophet to foresee that on the argument used to support this law others could be upheld providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools. Arguments made in favor of this New York law point squarely in this direction, namely, that the fact that government has not heretofore aided religious schools with tax-raised funds amounts to a discrimination against those schools and against religion. And that there are already efforts to have government supply the money to erect buildings for sectarian religious schools is shown by a recent Act of Congress which apparently allows for precisely that. See Higher Education Facilities Act of 1963, 77 Stat. 363, 20 U. S. C. § 701 *et seq.*

I still subscribe to the belief that tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their

teachers, or pay any other of their maintenance expenses, even to the extent of one penny. The First Amendment's prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny. And I still believe that the only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide. The Court's affirmance here bodes nothing but evil to religious peace in this country.

MR. JUSTICE DOUGLAS, dissenting.

We have for review a statute which authorizes New York State to supply textbooks to students in parochial as well as in public schools. The New York Court of Appeals sustained the law on the grounds that it involves only "secular textbooks" and that that type of aid falls within *Everson* v. *Board of Education*, 330 U. S. 1,[1] where a divided Court upheld a state law which made bus service available to students in parochial schools as well as to students in public schools. 20 N. Y. 2d 109, 228 N. E. 2d 791, 281 N. Y. S. 2d 799.

The statute on its face empowers each parochial school to determine for itself which textbooks will be eligible for loans to its students, for the Act provides that the

[1] *Everson*, relied on by the Court of Appeals of New York, did not involve textbooks and did not present the serious problems raised by a form of aid to parochial students which injects religious issues into the choice of curriculum. In the only decision of this Court upholding a state grant of textbooks to sectarian school students, *Cochran* v. *Board of Education*, 281 U. S. 370, the First Amendment issue was not raised. See *id.*, at 370–373; *Everson* v. *Board of Education*, 330 U. S. 1, 29, n. 3 (dissenting opinion).

only text which the State may provide is "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends." New York Education Law § 701, subd. 2. This initial and crucial selection is undoubtedly made by the parochial school's principal or its individual instructors, who are, in the case of Roman Catholic schools, normally priests or nuns.

The next step under the Act is an "individual request" for an eligible textbook (§ 701, subd. 3), but the State Education Department has ruled that a pupil may make his request to the local public board of education through a "private school official." [2] Local boards have accordingly provided for those requests to be made by the individual or "by groups or classes." [3] And forms for textbook requisitions to be filled out by the head of the private school are provided.[4]

The role of the local public school board is to decide whether to veto the selection made by the parochial school. This is done by determining first whether the text has been or should be "approved" for use in public schools and second whether the text is "secular," "nonreligious," or "non-sectarian." [5] The local boards ap-

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[2] Letter from Herbert F. Johnson, State Education Department, to City, Village and District Superintendents & Supervising Principals, ¶ 5, Jan. 10, 1966, reproduced in Brief for American Jewish Committee et al. as *Amici Curiae*, at 43, 44.

[3] Manual of Instructions on Recordkeeping Procedures for Textbooks Loaned in Conformance With Provisions of the New York State Textbook Law ¶ 2.3 (1967), reproduced in Brief for National Jewish Commission on Law and Public Affairs as *Amicus Curiae*, at 24, 25.

[4] See Appendix A to this opinion.

[5] The State Court of Appeals used the phrases "secular textbooks" and "nonreligious textbooks" without any elaboration as to what was meant. 20 N. Y. 2d, at 117, 228 N. E. 2d, at 794–795, 281 N. Y. S. 2d, at 805. The legislature, in its "statement of policy" to the Act (Laws of 1965, c. 320, § 1), speaks of aiding instruction

parently have broad discretion in exercising this veto power.[6]

Thus the statutory system provides that the parochial school will ask for the books that it wants. Can there be the slightest doubt that the head of the parochial school will select the book or books that best promote its sectarian creed?

If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church and state separate has been lost. If the board resists, then the battle line between church and state will have been drawn and the contest will be on to keep the school board independent or to put it under church domination and control.

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in "non-sectarian subjects," and gives as examples "science, mathematics, [and] foreign languages." The State Department of Education has stated that "it is necessary that . . . [t]he textbooks be non-sectarian (this eliminates denominational editions and those carrying the 'imprimatur' or 'nihil obstat' of a religious authority) . . . ." Opinion of Counsel No. 181. There are no other definitions to be found.

The Court was advised at oral argument by the Assistant Attorney General that Opinion of Counsel No. 181 is advisory only and not binding. It would state the policy of the New York Department of Education in event of an appeal to it by a taxpayer of a local board's decision that a certain text was "non-sectarian" or should be "approved." The Regents of the University of the State of New York, who have the last word on such matters and are specifically authorized by § 701, subd. 3, to promulgate regulations respecting the textbook loan program, have not done so, and their position on what is "non-sectarian" is unknown.

[6] For example the regulations of the Board of Education of the City of New York respecting approval of textbooks for public schools contain no limitations directly relevant to the question of sectarianism. The material is to "promote the objectives of the educational program," "treat the subject competently and accurately," "be in good taste," "have a wholesome tone that is consonant with right conduct and civic values," "be in harmony with American democratic ideals and moral values," "be free of any reflection on the dignity and status of any group, race, or religion,

Whatever may be said of *Everson,* there is nothing ideological about a bus. There is nothing ideological about a school lunch, or a public nurse, or a scholarship. The constitutionality of such public aid to students in parochial schools turns on considerations not present in this textbook case. The textbook goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed or faith. How can we possibly approve such state aid to a religion? A parochial school textbook may contain many, many more seeds of creed and dogma than a prayer. Yet we struck down in *Engel* v. *Vitale,* 370 U. S. 421, an official New York prayer for its public schools, even though it was not plainly denominational. For we emphasized the violence done the Establishment Clause when the power was given religious-political groups "to write their own prayers into law." *Id.,* at 427. That risk is compounded here by giving parochial schools the initiative in selecting the textbooks they desire to be furnished at public expense.

Judge Van Voorhis, joined by Chief Judge Fuld and Judge Breitel, dissenting below, said that the difficulty with the textbook loan program "is that there is no reliable standard by which secular and religious textbooks

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whether expressed or implied, by statement or omission," and "be free of objectionable features of over-dramatization, violence, or crime." Guiding Principles for Schools in the Selection and Use of "Non-Listed" Instructional Materials (1952). Opinion of Counsel No. 181 (see n. 5, *supra*) simply states that the local board, if it finds that no other board has approved the text in question, should "decide if it wishes to approve the same itself." This opinion of counsel also states that if the board is in doubt as to whether a text is "non-sectarian," that is whether it carries an imprimatur or nihil obstat or is a denominational edition, it "must make the appropriate determination."

can be distinguished from each other." 20 N. Y. 2d, at 122, 228 N. E. 2d, at 798, 281 N. Y. S. 2d, at 809. The New York Legislature felt that science was a nonsectarian subject (see n. 5, *supra*). Does this mean that any general science textbook intended for use in grades 7–12 may be provided by the State to parochial school students? May John M. Scott's Adventures in Science (1963) be supplied under the textbook loan program? This book teaches embryology in the following manner:

> "To you an animal usually means a mammal, such as a cat, dog, squirrel, or guinea pig. The new animal or embryo develops inside the body of the mother until birth. The fertilized egg becomes an embryo or developing animal. Many cell divisions take place. In time some cells become muscle cells, others nerve cells or blood cells, and organs such as eyes, stomach, and intestine are formed.
>
> "The body of a human being grows in the same way, but it is much more remarkable than that of any animal, for the embryo has a human soul infused into the body by God. Human parents are partners with God in creation. They have very great powers and great responsibilities, for through their cooperation with God souls are born for heaven." (At 618–619.)[7]

Comparative economics would seem to be a nonsectarian subject. Will New York, then, provide Arthur J. Hughes' general history text, Man in Time (1964), to

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[7] Although the author of this textbook is a priest, the text contains no imprimatur and no nihil obstat. Although published by a Catholic press, the Loyola University Press, Chicago, it is not marked in any manner as a "denominational edition," but is simply the general edition of the book. Accordingly, under Opinion of Counsel No. 181, the only document approaching a "regulation" on the issue involved here, Adventures in Science would qualify as "non-sectarian." See nn. 5, 6, *supra*.

parochial school students? It treats that topic in this manner:

> "Capitalism is an economic system based on man's right to private property and on his freedom to use that property in producing goods which will earn him a just profit on his investment. Man's right to private property stems from the Natural Law implanted in him by God. It is as much a part of man's nature as the will to self-preservation." (At 560.)
>
> "The broadest definition of socialism is government ownership of all the means of production and distribution in a country. . . . Many, but by no means all, Socialists in the nineteenth century believed that crime and vice existed because poverty existed, and if poverty were eliminated, then crime and vice would disappear. While it is true that poor surroundings are usually unhealthy climates for high moral training, still, man has the free will to check himself. Many Socialists, however, denied free will and said that man was a creation of his environment. . . . If Socialists do not deny Christ's message, they often ignore it. Christ showed us by His life that this earth is a testing ground to prepare man for eternal happiness. Man's interests should be in this direction at least part of the time and not always directed toward a futile quest for material goods." (At 561–564.)[8]

Mr. Justice Jackson said, ". . . I should suppose it is a proper, if not an indispensable, part of preparation for a

[8] Man In Time contains a nihil obstat and an imprimatur. Thus, if Opinion of Counsel No. 181 (see nn. 5, 6, *supra*) is applicable, this book may not be provided by the State. The Opinion of Counsel, however, is only "advisory," we are told; moreover, the religious endorsements could easily be removed by the author and publisher at the next printing.

worldly life to know the roles that religion and religions have played in the tragic story of mankind." *McCollum* v. *Board of Education*, 333 U. S. 203, 236 (concurring opinion). Yet, as he inquired, what emphasis should one give who teaches the Reformation, the Inquisition, or the early effort in New England to establish " 'a Church without a Bishop and a State without a King?' " *Ibid.* What books should be chosen for those subjects?

Even where the treatment given to a particular topic in a school textbook is not blatantly sectarian, it will necessarily have certain shadings that will lead a parochial school to prefer one text over another.[9]

The Crusades, for example, may be taught as a Christian undertaking to "save the Holy Land" from the Moslem Turks who "became a threat to Christianity and its holy places," which "they did not treat . . . with respect"

[9] Some parochial schools may prefer those texts which are liberally sprinkled with religious vignettes. This creeping sectarianism avoids the direct teaching of religious doctrine but keeps the student continually reminded of the sectarian orientation of his education. In P. Furlong, Sr. Margaret, & D. Sharkey's American history text, America Yesterday (1963), for example, the student is informed that the first mass to be said in what is now the United States was in 1526 near Chesapeake Bay, that eight French missionaries to Canada in the early 1600's were canonized in 1930, that one of the men who signed the Declaration of Independence and two who attended the Constitutional Convention were Catholic, and that the superintendent of the Hudson Bay Company's outpost in the Oregon country converted to Catholicism in 1842. At 26, 73–74, 102, 140, 235. And J. Scott's Adventures in Science (1963), in teaching the atmospheric conditions prevailing at the top of Mount Everest, informs the student that when Sir Edmund Hillary first scaled this peak he placed there a "tiny crucifix" which a Benedictine monk had supplied. At 72.

America Yesterday, *supra*, is another example of a text written by the clergy (here a priest and nun together with one layman) that contains no imprimatur and no nihil obstat and is not a denominational edition. See nn. 5–7.

(H. Wilson, F. Wilson, B. Erb & E. Clucas, Out of the Past 284 (1954)), or as essentially a series of wars born out of political and materialistic motives (see G. Leinwand, The Pageant of World History 136–137 (1965)).

Is the dawn of man to be explained in the words, "God created man and made man master of the earth" (P. Furlong, The Old World and America 5 (1937)), or in the language of evolution (see T. Wallbank, Man's Story 32–35 (1961))?

Is the slaughter of the Aztecs by Cortes and his entourage to be lamented for its destruction of a New World culture (see J. Caughey, J. Franklin, & E. May, Land of the Free 27–28 (1965)), or forgiven because the Spaniards "carried the true Faith" to a barbaric people who practiced human sacrifice (see P. Furlong, Sr. Margaret, & D. Sharkey, America Yesterday 17, 34 (1963))?

Is Franco's revolution in Spain to be taught as a crusade against anti-Catholic forces (see R. Hoffman, G. Vincitorio, & M. Swift, Man and His History 666–667 (1958))[10] or as an effort by reactionary elements to regain control of that country (see G. Leinwand, The Pageant of World History, *supra*, at 512)?[11] Is the expansion of

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[10] "In Spain early in 1936 a popular-front organization won a victory in the national elections. The result was a government made up of discordant political elements that failed to preserve civil order in the country. Violent anti-Catholics attacked and burned churches and monasteries, and the government did not even try to prevent these crimes. As a result, Spaniards who loved their country and were loyal to their religion revolted against the popular-front government of the republic. An able general, Francisco Franco, put himself at the head of the revolt, which began in July 1936."

[11] "Spain, at the end of World War I, was a backward, poverty-stricken monarchy. In 1931, the king resigned and the people established a republic. The Spanish tried many reforms, but there were many who wanted to go back to the old ways and old privileges of the monarchy. Those who were rich wanted to hold on to

communism in select areas of the world a manifestation of the forces of Evil campaigning against the forces of Good? See A. Hughes, Man in Time, *supra*, at 565–568, 666–669, 735–748.

It will be often difficult, as Mr. Justice Jackson said, to say "where the secular ends and the sectarian begins in education." *McCollum* v. *Board of Education*, 333 U. S., at 237–238. But certain it is that once the so-called "secular" textbook is the prize to be won by that religious faith which selects the book, the battle will be on for those positions of control. Judge Van Voorhis expressed the fear that in the end the state might dominate the church. Others fear that one sectarian group, gaining control of the state agencies which approve the "secular" textbooks, will use their control to disseminate ideas most congenial to their faith. It must be remembered that the very existence of the religious school—whether Catholic or Mormon, Presbyterian or Episcopalian—is to provide an education oriented to the dogma of the particular faith.[12]

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their property. These people thought that Francisco Franco, a Fascist, could help them.

"In 1936, a civil war started which soon came to be called a 'dress rehearsal' for World War II because the Fascist countries of Italy and Germany supported Franco and his rebels. On the other hand, Russia supported the loyalists (as the armies of the republic were called). The democratic countries might have supported the loyalists, too, but fear of communism prevented them from doing so. Franco defeated the loyalists and, in 1938, became dictator of Spain and today as *El Caudillo* ('The Leader') still rules Spain with an iron hand."

[12] The purpose of the parochial school in the beginning is clear beyond peradventure. The generally held Roman Catholic position in the matter of education in public and parochial schools has been well summarized by the late Monsignor John A. Ryan (1869–1945):

"'As a matter of fact, the State maintains a system of schools which is not completely satisfactory to Catholics, inasmuch as no

Father Peter O'Reilly put the matter succinctly when he disclosed what was happening in one Catholic school: [13] "On February 24, 1954, Rev. Cyril F. Meyer, C. M., then Vice President of the University, sent the following letter to all the faculty, both Catholics and non-Catholics, even those teaching law, science, and mathematics:

"'Dear Faculty Member:

"'As a result of several spirited discussions in the Academic Senate, a resolution was passed by that body that a self-evaluation be made of the effectiveness with which we are achieving in our classrooms the stated objectives of the University. . . . The primacy of the spiritual is the reason for a Christian university. Our goal is not merely to equip students with marketable skills. It is far above this—to educate man, the whole man, the theocentric man. As you are well aware, we strive to educate not only for personal and social success in secular society, but far more for leadership toward a theocentric society. . . .

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place is given to morality and religion. Since the Church realizes that the teaching of religion and instruction in the secular branches cannot rightfully or successfully be separated one from the other, she is compelled to maintain her own system of schools for general education as well as for religious instruction. . . .'" 2 A. Stokes, Church and State in the United States 654 (1950).

"The education in the parochial schools follows in general the curriculum in the public schools, the main differences being that about 15 per cent of the time is given to religious instruction, and that the Catholic point of view is brought out in the treatment of historical and other subjects, just as the Protestant point of view might be emphasized in a Protestant school." *Ibid.*

Some, however, think that some parochial schools are changing their character under practical pressures of educational competition. See, *e. g.*, Fleming, Fordham Is Trying to be catholic With a Small "c," N. Y. Times Magazine, Dec. 10, 1967, p. 32.

[13] St. John's I: A Chronicle of Folly, 4 Continuum 223, 233–234 (1966).

"'May I, therefore, respectfully request that you submit answers as specific as possible to the following questions:

"'1. What do you do to make your particular courses theocentric?

"'2. Do you believe there is anything the Administration or your colleagues can do to assist you in presenting your particular courses more "according to the philosophical and theological traditions of the Roman Catholic Church"? Do not hesitate to let us know. There is no objective of our University more fundamental than this. We must all be aware that "the classroom that is not a temple is a den."

"'Please try to have your answers, using this size paper, returned to me by March 10.'"

This tendency is no Catholic monopoly:

"The Presbyterian-affiliated Lewis and Clark College seems to have a similar interest in appearances of autonomy, with a view to avoiding possible legal bars to both federal funds and gifts from some foundations. The change, which legitimizes the college as an autonomous educational institution, removes the requirement that each presbytery in Oregon have at least one representative on the board, but it was made clear 'The college wishes to change *only its legal relationship* to the synod and *not its purposes,*' and promised that it still will elect a minister from each presbytery to the board on nomination of the synod, and will consult the synod before making any change in its statement of purpose, which defines it as a Presbyterian-related college." [14]

The challenged New York law leaves to the Board of Regents, local boards of education, trustees, and other school authorities the supervision of the textbook program.

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[14] *Id.*, 234 (emphasis in original).

The Board of Regents (together with the Commissioner of Education) has powers of censorship over all textbooks that contain statements seditious in character, or evince disloyalty to the United States or are favorable to any nation with which we are at war. New York Education Law § 704. Those powers can cut a wide swath in many areas of education that involve the ideological element.[15]

In general textbooks are approved for distribution by "boards of education, trustees or such body or officer as perform the functions of such boards . . . ." New York Education Law § 701, subd. 1. These school boards are generally elected, §§ 2013, 2502, subd. 2, though in a few cities they are appointed. § 2553. Where there are trustees, they are elected. §§ 1523, 1602, 1702. And superintendents who advise on textbook selection are appointed by the board of education or the trustees. §§ 1711, 2503, subd. 5, 2507.

The initiative to select and requisition "the books desired" is with the parochial school. Powerful religious-political pressures will therefore be on the state agencies to provide the books that are desired.

These then are the battlegrounds where control of textbook distribution will be won or lost. Now that "secular" textbooks will pour into religious schools, we can rest assured that a contest will be on [16] to provide those books for religious schools which the dominant religious group concludes best reflect the theocentric or other philosophy of the particular church.

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[15] Cf. *Adler* v. *Board of Education*, 342 U. S. 485; *Barsky* v. *Board of Regents*, 347 U. S. 442.

[16] The proportions of the contest are suggested in the letter dated November 1, 1967, that the late Cardinal Spellman directed to be read at all the masses on Sunday, November 5, 1967, just before the vote on a proposed Constitution that would have opened wide the door to state aid to parochial schools. I have attached the letter as Appendix B to this opinion.

The stakes are now extremely high—just as they were in the school prayer cases (see *Engel* v. *Vitale, supra*)—to obtain approval of what is "proper." For the "proper" books will radiate the "correct" religious view not only in the parochial school but in the public school as well.

Even if I am wrong in that basic premise, we still should not affirm the judgment below. Judge Van Voorhis, dissenting in the New York Court of Appeals, thought that the result of tying parochial school textbooks to public funds would be to put nonsectarian books into religious schools, which in the long view would tend towards state domination of the church. 20 N. Y. 2d, at 123, 228 N. E. 2d, at 798, 281 N. Y. S. 2d, at 810. That would, indeed, be the result if the school boards did not succumb to "sectarian" pressure or control. So, however the case be viewed—whether sectarian groups win control of school boards or do not gain such control—the principle of separation of church and state, inherent in the Establishment Clause of the First Amendment, is violated by what we today approve.

What Madison wrote in his famous Memorial and Remonstrance against Religious Assessments is highly pertinent here: [17]

> "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment,[18] may force him to conform to any other establishment in all cases whatsoever?"

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[17] 2 Writings of James Madison 186 (Hunt ed. 1901).

[18] For a recent account of the extent to which public funds are being poured into sectarian schools see S. Rep. No. 473, 90th Cong., 1st Sess., 9–10 (1967).

APPENDIX A TO OPINION OF DOUGLAS, J., DISSENTING.

CODE—220-399-2-NYSTL REQ. NUMBER .....

TEXTBOOK REQUISITION

PUBLISHERS NAME .....

STREET ADDRESS .....

CITY AND STATE .....

SHIP TO —EDISON WAREHOUSE

STREET —VAN GUYSLING AVE.

CITY & STATE—SCHENECTADY, N. Y.

NO. COPIES ... NAME OF BOOK ..... TOTAL ...

EDITION .....

GRADE LEVEL .....

PRICE PER BOOK ....
Total Amount

I certify that the following number of children residing in your school district have individually requested the loan of the textbook indicated above for the school year 1967–68 in accordance with Section 701, subdivision 2, of the Education Law. Form 1 requests have been submitted to you for each child. I also certify that the textbook requested is a non-sectarian edition and approved for use by a New York State Public School District.

....
Name of Parochial/Private School Official of Private School

APPENDIX B TO OPINION OF DOUGLAS, J., DISSENTING.

LETTER OF FRANCIS CARDINAL SPELLMAN, NOVEMBER 1, 1967.

One of the most precious rights which we have in our civil society is the right to vote. This right should be exercised with reverence and with understanding—particularly when emotional feelings run high.

An important opportunity to exercise this right will be provided on next Tuesday, November 7th. On that day we are asked to choose between the old State Constitution and the proposed new State Constitution. We will decide whether the provisions of the new Constitution will better serve the changing needs of our families, our neighbors, and our institutions, both public and private.

We are faced with a grave responsibility to weigh this choice carefully and to vote conscientiously. I have viewed with concern the tone of the past month's discussion with regard to the proposed new Constitution. I am disappointed that so much of the opposition to the Constitution comes from those forces in our pluralistic society who would deny equal educational opportunities to children attending parochial schools. As a citizen I am dismayed to think that they would have overwhelmingly supported the new Constitution were it not for the fact that it repeals the Blaine Amendment.

The proposed new Constitution, as a whole, is so closely related to our lives that it must command our careful consideration. This document addresses itself to values basic to the fulfillment of our lives as citizens. We must be aware that this Constitution contains new provisions designed to facilitate the rebuilding of our communities, new provisions committing the State to the

maximum development of the educational potential of every citizen, new provisions enabling government, in a responsible way, to mobilize all the forces of society to meet the changing needs of all our people, to enhance their environment and to promote their social well-being.

At the close of the Constitutional Convention I expressed my opinion that the Convention had produced a document worthy of support by the people of New York State. Nothing in the public debate since then has caused me to alter my judgment.

I know that you will conscientiously fulfill your civic duty and that you will give serious consideration to this proposed new Constitution.*

MR. JUSTICE FORTAS, dissenting.

The majority opinion of the Court upholds the New York statute by ignoring a vital aspect of it. Public funds are used to buy, for students in sectarian schools, textbooks which are selected and prescribed by the sec-

*One parochial school lobbyist group has urged Congress that in order to avoid an establishment of secularism in education, federal monies must be distributed to all the various sects which operate parochial schools.

"[T]here is no valueless or neutral school," it is argued, and education and religion cannot be separated from each other. Hearings on S. 3 and H. R. 1198 before Subcommittee No. 3 of the House Committee on the Judiciary, 90th Cong., 2d Sess., at — (1968) (statement of Dr. Francis J. Brown, chairman, National Association for Personal Rights in Education).

The views expressed by my Brother HARLAN in his concurring opinion are somewhat similar. His approval, on a constitutional basis, of government aid to our country's churches "calculated to achieve nonreligious purposes otherwise within the competence of the State" and not involving the state " 'significantly and directly in the realm of the sectarian' " would seem to permit considerable diversion of public funds to the various sects. The state's "competence" in the areas of health, safety, and welfare of the people would under that view permit it to fund a church's charity pro-

tarian schools themselves. As my Brother DOUGLAS points out, despite the transparent camouflage that the books are furnished to students, the reality is that they are selected and their use is prescribed by the sectarian authorities. The child must use the prescribed book. He cannot use a different book prescribed for use in the public schools. The State cannot choose the book to be used. It is true that the public school boards must "approve" the book selected by the sectarian authorities; but this has no real significance. The purpose of these provisions is to hold out promise that the books will be "secular" (but cf. DOUGLAS, J., dissenting, *ante*, at 256, n. 6); but the fact remains that the books are chosen by and for the sectarian schools.

It is misleading to say, as the majority opinion does, that the New York "law merely makes available to all children the benefits of a general program to lend school books free of charge." (*Ante*, at 243.) This is not a "general" program. It is a specific program to use state

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grams, pay for renovating dilapidated church buildings, and pay for the services and upkeep, such as janitors' salaries and utility bills, necessary to maintain church buildings in safe and healthful condition. Indeed, short of state-provided prayer books, sacramental wine, and the like, churches could, apparently, become virtual state dependencies.

Should that, unhappily, come to pass, then perhaps the church would in time become an administrative arm of the state, a goal predicted by J. Galbraith for "the mature corporation." The New Industrial State 393 (1967).

Then the circle would be completed and we would return to the point where the long struggle to keep church and state separate first started.

Such a constitutional form of government is conceivable. But proposals for putting each of the Nation's religious sects on the public payroll should be addressed to a federal constitutional convention, since, as my Brother BLACK shows, such a scheme was thoroughly rejected in 1791 with the adoption of the First Amendment.

funds to buy books prescribed by sectarian schools which, in New York, are primarily Catholic, Jewish, and Lutheran sponsored schools. It could be called a "general" program only if the school books made available to all children were precisely the same—the books selected for and used in the public schools. But this program is not one in which all children are treated alike, regardless of where they go to school. This program, in its unconstitutional features, is hand-tailored to satisfy the specific needs of sectarian schools. Children attending such schools are given *special* books—books selected by the sectarian authorities. How can this be other than the use of public money to aid those sectarian establishments?

It is also beside the point, in my opinion, to "assume," as the majority opinion does, that "books loaned to students are books that are not unsuitable for use in the public schools because of religious content." (*Ante*, at 245.) The point is that the books furnished to students of sectarian schools are selected by the religious authorities and are prescribed by them.

This case is not within the principle of *Everson* v. *Board of Education*, 330 U. S. 1 (1947). Apart from the differences between textbooks and bus rides, the present statute does not call for extending to children attending sectarian schools the same service or facility extended to children in public schools. This statute calls for furnishing special, separate, and particular books, specially, separately, and particularly chosen by religious sects or their representatives for use in their sectarian schools. This is the infirmity, in my opinion. This is the feature that makes it impossible, in my view, to reach any conclusion other than that this statute is an unconstitutional use of public funds to support an establishment of religion.

This is the feature of the present statute that makes it totally inaccurate to suggest, as the majority does

here, that furnishing these specially selected books for use in sectarian schools is like "public provision of police and fire protection, sewage facilities, and streets and sidewalks." (*Ante*, at 242.) These are furnished to all alike. They are not selected on the basis of specification by a religious sect. And patrons of any one sect do not receive services or facilities different from those accorded members of other religions or agnostics or even atheists.

I would reverse the judgment below.

Syllabus.

GARDNER *v.* BRODERICK, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 635. Argued April 30, 1968.—Decided June 10, 1968.

Appellant, a police officer, was subpoenaed by and appeared before a grand jury which was investigating alleged bribery and corruption of police officers, and was advised that the grand jury proposed to examine him concerning the performance of his official duties. He was advised of his privilege against self-incrimination, but was asked to sign a "waiver of immunity" after being told that he would be fired if he did not sign. He refused to do so, was given an administrative hearing, and was discharged solely for his refusal, pursuant to § 1123 of the New York City Charter. The New York Supreme Court dismissed his petition for reinstatement and the New York Court of Appeals affirmed, holding that *Garrity* v. *New Jersey*, 385 U. S. 493, was not controlling, and distinguishing *Spevack* v. *Klein*, 385 U. S. 511 (both decided after appellant's discharge). *Held:* If appellant, a policeman, had refused to answer questions directly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity*, *supra*, the privilege against self-incrimination would not have been a bar to his dismissal. However, his dismissal solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege, and the New York City Charter provision pursuant to which he was dismissed, cannot stand. Pp. 276–279.

20 N. Y. 2d 227, 229 N. E. 2d 184, reversed.

Ronald Podolsky argued the cause and filed briefs for appellant.

J. Lee Rankin argued the cause for appellees. With him on the brief were *Norman Redlich*, *Stanley Buchsbaum*, and *Robert T. Hartmann*.

Michael J. Silverberg filed a brief for the Patrolmen's Benevolent Association of the City of New York, Inc., as *amicus curiae*, urging reversal.

MR. JUSTICE FORTAS delivered the opinion of the Court.

Appellant brought this action in the Supreme Court of the State of New York seeking reinstatement as a New York City patrolman and back pay. He claimed he was unlawfully dismissed because he refused to waive his privilege against self-incrimination. In August 1965, pursuant to subpoena, appellant appeared before a New York County grand jury which was investigating alleged bribery and corruption of police officers in connection with unlawful gambling operations. He was advised that the grand jury proposed to examine him concerning the performance of his official duties. He was advised of his privilege against self-incrimination,[1] but he was asked to sign a "waiver of immunity" after being told that he would be fired if he did not sign.[2] Following

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[1] The Assistant District Attorney said to appellant:

"You understand . . . that under the Constitution of the United States, as well as the Constitution of New York, no one can be compelled to testify against himself, and that he has a right, the absolute right to refuse to answer any questions that would tend to incriminate him?"

[2] Appellant was told:

"You understand . . . that under the Constitution of New York, as well as the Charter of the City of New York, . . . a public officer, which includes a police officer, when called before a Grand Jury to answer questions concerning the conduct of his public office and the performance of his duties is required to sign a waiver of immunity if he wishes to retain that public office?"

The document appellant was asked to sign was phrased as follows:

"I . . . do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution, and punishment for or on account of, regarding or relating to any matter, transaction or things, concerning the conduct of my office or the

his refusal, he was given an administrative hearing and was discharged solely for this refusal, pursuant to § 1123 of the New York City Charter.[3]

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performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomination, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence documentary or otherwise, before the [blank] Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury."

[3] That section provides:

"If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Section 6 of Article I of the New York Constitution provides:

"No person shall be . . . compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office . . . or the performance of his official duties . . . refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years . . . and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general."

The New York Supreme Court dismissed his petition for reinstatement, 27 App. Div. 2d 800, 279 N. Y. S. 2d 150 (1967), and the New York Court of Appeals affirmed. 20 N. Y. 2d 227, 229 N. E. 2d 184 (1967). We noted probable jurisdiction. 390 U. S. 918 (1968).

Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result may be self-incriminatory, and the need fully to implement its guaranty. See *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Counselman* v. *Hitchcock*, 142 U. S. 547, 585–586 (1892); *Albertson* v. *SACB*, 382 U. S. 70, 80 (1965). The privilege is applicable to state as well as federal proceedings. *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964). The privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made. Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying. *Counselman* v. *Hitchcock*, *supra*, at 585–586; *Murphy* v. *Waterfront Commission*, *supra*, at 79.

The question presented in the present case is whether a policeman who refuses to waive the protections which the privilege gives him may be dismissed from office because of that refusal.

About a year and a half after New York City discharged petitioner for his refusal to waive this immunity, we decided *Garrity* v. *New Jersey*, 385 U. S. 493 (1967). In that case, we held that when a policeman had been compelled to testify by the threat that otherwise he would be removed from office, the testimony that he gave could not be used against him in a subsequent prosecution. Garrity had not signed a waiver of immunity and no immunity statute was applicable in the circumstances.

Our holding was summarized in the following statement (at 500):

> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

The New York Court of Appeals considered that *Garrity* did not control the present case. It is true that *Garrity* related to the attempted use of compelled testimony. It did not involve the precise question which is presented here: namely, whether a State may discharge an officer for refusing to waive a right which the Constitution guarantees to him. The New York Court of Appeals also distinguished our post-*Garrity* decision in *Spevack* v. *Klein, supra.* In *Spevack,* we ruled that a lawyer could not be disbarred solely because he refused to testify at a disciplinary proceeding on the ground that his testimony would tend to incriminate him. The Court of Appeals concluded that *Spevack* does not control the present case because different considerations apply in the case of a public official such as a policeman. A lawyer, it stated, although licensed by the state is not an employee. This distinction is now urged upon us. It is argued that although a lawyer could not constitutionally be confronted with Hobson's choice between self-incrimination and forfeiting his means of livelihood, the same principle should not protect a policeman. Unlike the lawyer, he is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other "client" or principal. He is a trustee of the public interest, bearing

the burden of great and total responsibility to his public employer. Unlike the lawyer who is directly responsible to his client, the policeman is either responsible to the State or to no one.[4]

We agree that these factors differentiate the situations. If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties,[5] without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity* v. *New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal.

The facts of this case, however, do not present this issue. Here, petitioner was summoned to testify before a grand jury in an investigation of alleged criminal conduct. He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination. The Constitution of New York State and the City Charter both expressly provided that his failure to do so, as well as his failure to testify, would result in dismissal from his job. He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege. *Garrity* v. *New Jersey, supra.*

We need not speculate whether, if appellant had executed the waiver of immunity in the circumstances, the effect of our subsequent decision in *Garrity* v. *New Jersey, supra,* would have been to nullify the effect of

[4] Cf. *Spevack* v. *Klein, supra,* at 519–520 (concurring in judgment).

[5] The statements in my separate opinion in *Spevack* v. *Klein, supra,* at 519–520, to which the New York Court of Appeals referred, are expressly limited to situations of this kind.

the waiver. New York City discharged him for refusal to execute a document purporting to waive his constitutional rights and to permit prosecution of himself on the basis of his compelled testimony. Petitioner could not have assumed—and certainly he was not required to assume—that he was being asked to do an idle act of no legal effect. In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment. It is clear that petitioner's testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to seek to compel petitioner to waive his immunity.

Proper regard for the history and meaning of the privilege against self-incrimination,[6] applicable to the States under our decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), and for the decisions of this Court,[7] dictate the conclusion that the provision of the New York City Charter pursuant to which petitioner was dismissed cannot stand. Accordingly, the judgment is

Reversed.

MR. JUSTICE BLACK concurs in the result.

[For opinion of MR. JUSTICE HARLAN, concurring in the result, see *post*, p. 285.]

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[6] See *Miranda* v. *Arizona*, 384 U. S. 436, 458–466 (1966), and authorities cited therein.

[7] See, *e. g.*, *Griffin* v. *California*, 380 U. S. 609 (1965); *Malloy* v. *Hogan*, *supra*.

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UNIFORMED SANITATION MEN ASSN., INC., ET AL. *v.* COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 823. Argued May 1, 1968.—Decided June 10, 1968.

In connection with an investigation of improper activities by New York City sanitation employees the individual petitioners, fifteen sanitation employees, were summoned before the Commissioner of Investigation and advised that, if they refused to testify with respect to their official conduct on the ground of self-incrimination, their employment would terminate, in accordance with § 1123 of the City Charter. Twelve asserted the privilege against self-incrimination and refused to testify, after being told that their answers could be used against them in subsequent proceedings. They were dismissed on the basis of that refusal. Three employees who answered the questions and denied the charges made against them were suspended, and then called before a grand jury and asked to sign waivers of immunity. Upon their refusal to do so they were dismissed on the ground that they violated § 1123 by refusing to sign the waivers. The Federal District Court dismissed petitioners' action for a declaratory judgment and injunctive relief based on the alleged wrongful discharge in violation of their constitutional rights, and the Court of Appeals affirmed. *Held:* Petitioners as public employees are entitled, like all other persons, to the benefit of the constitutional privilege against self-incrimination and they may not be faced with proceedings which, as here, presented them with a choice between surrendering their constitutional rights or their jobs. *Gardner* v. *Broderick, ante,* p. 273. Public employees are subject to dismissal if they refuse to account for the performance of their public trust after proper proceedings which do not involve an attempt to coerce them to relinquish their constitutional rights. Pp. 283–285.

383 F. 2d 364, reversed.

Leonard B. Boudin argued the cause for petitioners. With him on the briefs was *Victor Rabinowitz.*

Norman Redlich argued the cause for respondents. With him on the brief were *J. Lee Rankin* and *John J. Loflin.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

The individual petitioners are 15 employees of the Department of Sanitation of New York City. Claiming they were wrongfully dismissed from employment in violation of their rights under the United States Constitution, they commenced this action for declaratory judgment and injunctive relief in the United States District Court for the Southern District of New York. That court dismissed the action and the Court of Appeals for the Second Circuit affirmed. 383 F. 2d 364 (1967). We granted certiorari. 390 U. S. 919 (1968).

Sometime in 1966, the Commissioner of Investigation of New York City[1] began an investigation of charges that employees of the Department of Sanitation were not charging private cartmen proper fees for use of certain city facilities and were diverting to themselves the proceeds of fees that they did charge. The Commissioner obtained an order from the Supreme Court in New York County authorizing him to tap a telephone leased by the Department of Sanitation for the transaction of official business at the city facilities in question.[2]

In November 1966 each of the petitioners was summoned before the Commissioner. Each was advised that, in accordance with § 1123 of the New York City Charter,

[1] Section 803, subd. 2, of the New York City Charter provides that the Commissioner "[i]s authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

[2] This order was pursuant to § 813–a of the Code of Criminal Procedure of New York. See *Berger* v. *New York,* 388 U. S. 41 (1967).

if he refused to testify with respect to his official conduct or that of any other city employee on the grounds of self-incrimination, his employment and eligibility for other city employment would terminate.[3]

Twelve of the petitioners, asserting the constitutional privilege against self-incrimination, refused to testify. After a disciplinary hearing held pursuant to § 75 of the New York Civil Service Law, they were dismissed by the Commissioner of Sanitation on the explicit ground provided by § 1123 of the City Charter that they had refused to testify.

Three of the petitioners answered the questions put to them, denying the charges made. They were thereafter suspended by the Commissioner of Sanitation on the basis of "information received from the Commissioner of Investigation concerning irregularities arising out of [their] employment in the Department of Sanitation." Subsequently, they were summoned before a grand jury and asked to sign waivers of immunity. They refused. Administrative hearings were held pursuant to § 75 of the Civil Service Law, and they were dismissed from employment on the sole ground that they had

[3] Section 1123 of the New York City Charter provides:
"If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

violated § 1123 of the City Charter by refusing to sign waivers of immunity. We consider only the dismissal, rather than the suspension, of these petitioners.

Relying upon the decision of the New York Court of Appeals in *Gardner* v. *Broderick,* 20 N. Y. 2d 227, 229 N. E. 2d 184 (1967) (reversed this day, *ante,* p. 273), the Court of Appeals for the Second Circuit held that the dismissal of petitioners did not offend the Federal Constitution. For the reasons which we elaborate in our opinion reversing the New York court's decision in *Gardner* v. *Broderick, supra,* we hold that the Court of Appeals erred.

Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege. Three were asked to sign waivers of immunity before the grand jury. Twelve were told that their answers to questions put to them by the Commissioner of Investigation could be used against them in subsequent proceedings,[4] and were discharged for refusal to

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[4] The Commissioner said:

"Mr. [name of witness], this is a private hearing being conducted by the Department of Investigation of the City of New York, pursuant to Chapter 34, of the New York City Charter. The investigation in which you are about to testify relates particularly to the affairs, functions, accounts, methods, personnel and efficiency of the Department of Sanitation of the City of New York. I wish to advise you that you have all the rights and privileges guaranteed by the laws of the State of New York and the Constitutions of this State and of the United States, including the right to remain silent and the right not to be compelled to be a witness against yourself. *I wish further to advise you that anything you say can be used against you in a court of law.* You have the right to have an attorney present

answer the questions on this basis. *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), in which we held that testimony compelled by threat of dismissal from employment could not be used in a criminal prosecution of the witness, had not been decided when these 12 petitioners were put to their hazardous choice. In any event, we need not decide whether these petitioners would have effectively waived this constitutional protection if they had testified following the warning that their testimony could be used against them. They were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally.[5]

As we stated in *Gardner* v. *Broderick, supra,* if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Con-

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at this hearing, if you wish, and I understand that you are represented by counsel in the person of [name of attorney], is that correct?" (Emphasis added.)

[5] As we noted in *Gardner* v. *Broderick, supra,* at 278–279, the possible ineffectiveness of this waiver does not change the fact that the State attempted to force petitioners, upon penalty of loss of employment, to relinquish a right guaranteed them by the Constitution.

stitution, including the privilege against self-incrimination. *Gardner* v. *Broderick, supra; Garrity* v. *New Jersey, supra.* Cf. *Murphy* v. *Waterfront Commission,* 378 U. S. 52, at 79 (1964). At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.

Accordingly, the judgment is reversed.[6]

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in the result.*

Given in combination the decisions in *Spevack* v. *Klein,* 385 U. S. 511, and *Garrity* v. *New Jersey,* 385 U. S. 493, I can find no solidly acceptable course for me to take in these cases other than to concur in the judgments rendered by the Court. I do so with a good deal less reluctance than would otherwise have been the case because, despite the distinctions which are sought to be drawn between these two cases, on the one hand, and *Spevack* and *Garrity,* on the other, I find in these opinions a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices. I add only that this is a welcome breakthrough in what *Spevack* and *Garrity* might otherwise have been thought to portend.

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[6] In view of our disposition of the case, we do not reach the issues raised by petitioners with respect to the wiretap.

*This opinion applies also to No. 635, *Gardner* v. *Broderick, ante,* p. 273.

GEORGE CAMPBELL PAINTING CORP. *v.* REID ET AL., MEMBERS OF NEW YORK CITY HOUSING AUTHORITY, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 673. Argued April 30, 1968.—Decided June 10, 1968.

The Public Authorities Law of New York requires all contracts awarded by a public authority for work or services to provide that upon refusal of "a person" to testify before a grand jury, to answer relevant questions, or to waive immunity against subsequent prosecution, such person and any corporation of which he is an officer or director shall be disqualified for five years from contracting with any public authority and any existing contracts may be canceled by the authority without penalty or damages. Appellant corporation's president, who was also a director and stockholder, executed three painting contracts, on behalf of appellant, with the New York City Housing Authority. When appellant learned of an impending investigation of bid rigging, the president resigned and divested himself of his stock. He remained in appellant's employ as an "estimator." He was later subpoenaed to appear before the grand jury and refused to sign a waiver of immunity. Appellant was notified that the contracts were canceled and that it and the president were disqualified for five years. The New York Court of Appeals denied relief to appellant, holding the disqualification valid and the statute constitutional. The court also rejected appellant's claim that it should not have been disqualified because its president resigned as president and director before being called to testify. *Held:*

1. The constitutional privilege against self-incrimination is "a personal one, applying only to natural individuals," and since appellant corporation cannot avail itself of the privilege it cannot take advantage of the claimed invalidity of a penalty imposed for refusal of an individual, its president, to waive the privilege. Pp. 288–289.

2. There is no reason to disturb the finding of the Court of Appeals that the resignation of the president was solely for the purpose of avoiding disqualification, and the conclusion of that court that the purported resignation should be disregarded for purposes of this case. P. 289.

20 N. Y. 2d 370, 229 N. E. 2d 602, affirmed.

Albert A. Blinder argued the cause for appellant. With him on the briefs were *Theodore M. Ruzow* and *Stephen Hochhauser.*

Paul W. Hessel argued the cause for appellee New York City Housing Authority. With him on the brief were *Harry Levy* and *I. Stanley Stein. Samuel A. Hirshowitz,* First Assistant Attorney General of New York, argued the cause for appellee Attorney General of New York. With him on the brief were *Louis J. Lefkowitz,* Attorney General of New York, *pro se,* and *Brenda Soloff,* Assistant Attorney General.

MR. JUSTICE FORTAS delivered the opinion of the Court.

The Public Authorities Law of New York, § 2601, provides that a clause must be inserted in all contracts awarded by a public authority of the State for work or services to provide that upon refusal of "a person" to testify before a grand jury, to answer any relevant question, or to waive immunity against subsequent criminal prosecution, such person and any firm or corporation of which he is a member, officer, or director shall be disqualified for five years from contracting with any public authority, and any existing contracts may be canceled by the public authority without incurring any penalty or damages.[1]

During 1964, appellant, a closely held family corporation, entered into three painting contracts with appellee New York City Housing Authority. Each of these contained the standard disqualification clause. The contracts were executed by appellant's president, George Campbell, Jr., who was also a director and stockholder of the corporation.

Early in 1965, appellant became aware that the District Attorney of New York County was conducting an

[1] Section 2602 provides for disqualification on the same basis without reference to any contractual clause.

investigation before a grand jury of alleged bid rigging on public contracts, including those of appellant. Thereafter, George Campbell, Jr., resigned as appellant's president and director and divested himself of his stock. He remained in appellant's employ as an "estimator."

A few weeks thereafter, Campbell was subpoenaed to appear before the grand jury. He refused to sign the waiver of immunity. In due course, the Public Housing Authority notified appellant that, pursuant to the provision in its contracts, the contracts were terminated and Campbell and the corporation were disqualified from doing business with the Authority for five years.

After proceedings in the lower courts of New York, the New York Court of Appeals denied relief to appellant. It held that the disqualification was valid and that § 2601 of the Public Authorities Law is constitutional, citing *Gardner* v. *Broderick*, 20 N. Y. 2d 227, 229 N. E. 2d 184 (1967) (reversed this day, *ante*, p. 273). The Court of Appeals also rejected appellant's claim that it should not have been disqualified because Campbell resigned as president and director before he was called to testify.[2] We noted probable jurisdiction. 390 U. S. 918 (1968).

We do not consider the constitutionality of § 2601 of New York's Public Authorities Law or the validity or effect of the contract provisions incorporating that section. Appellant's claim is that these provisions operated unconstitutionally to require its president, Mr. Campbell, to waive the benefits of his privilege against self-incrimination. But appellant cannot avail itself of this point, assuming its validity. It has long been settled in federal jurisprudence that the constitutional privilege against self-incrimination is "essentially a personal one, applying only to natural individuals." It "cannot be utilized by

[2] The Court of Appeals noted that § 2603 of the Public Authorities Act vests the State Supreme Court with jurisdiction, for stated reasons, to remove the disqualification.

or on behalf of any organization, such as a corporation." *United States* v. *White,* 322 U. S. 694, 698, 699 (1944); see also *Essgee Co.* v. *United States,* 262 U. S. 151 (1923); *Baltimore & Ohio R. Co.* v. *ICC,* 221 U. S. 612, 622 (1911); *Wilson* v. *United States,* 221 U. S. 361, 382–385 (1911); *Hale* v. *Henkel,* 201 U. S. 43, 74–75 (1906). If a corporation cannot avail itself of the privilege against self-incrimination, it cannot take advantage of the claimed invalidity of a penalty imposed for refusal of an individual, its president, to waive the privilege. Since the privilege is not available to it, appellant, a corporation, cannot invoke the privilege to challenge the constitutionality of § 2601 of the Public Authorities Law. *A fortiori,* it cannot assail the validity of the provision in the contracts into which it entered, incorporating the substance of that section.

As to appellant's claim that its due process rights were denied by the imposition of the penalty despite Mr. Campbell's purported resignation from managerial positions, we do not reach the abstract legal question that is urged upon us. We see no reason to disturb the finding of the New York Court of Appeals that "the resignation was tendered and accepted solely for the purpose of avoiding the statutory disqualification," and the conclusion of that court that the purported resignation should be disregarded for purposes of this case.

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

Appellant corporation has been disqualified as a contractor with the State of New York because its president, George Campbell, Jr., who was also a director and an owner of 10% of its stock, invoked the protection of the Self-Incrimination Clause of the Fifth Amendment when summoned before the grand jury. All other officers, di-

rectors, and the controlling stockholders of this closely held corporation appeared and indicated a willingness to sign waivers of immunity and to testify. The president, who invoked the Self-Incrimination Clause, resigned as officer and director and agreed to sell his 10% stock interest, though so far as appears the contract of sale has not been consummated.[1]

In the old days when a culprit, unpopular person, or suspect was punished by a bill of attainder, the penalty imposed often reached not only his own property, but also interests of his family.[2] When the present law blacklists this family corporation, it has a like impact.

I fail to see how any penalty—direct or collateral—can be imposed on anyone for invoking a constitutional guarantee. A corporation, to be sure, is not a beneficiary of the Self-Incrimination Clause, in the sense that it may invoke it. *United States* v. *White*, 322 U. S. 694. Yet placing this family corporation on the blacklist and

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[1] One of the directors of the corporation testified before appellee New York City Housing Authority that no consideration was paid for the stock at the time of transfer, and that there was as yet no formal or informal agreement as to payment for the stock.

Moreover, the pleadings reveal that George Campbell, Jr., was at all times relevant here a 10% residuary legatee under the estate of his late father. That estate contained 50% of the stock of appellant corporation. Thus, George Campbell, Jr., possessed a substantial additional interest in the corporation which would likely be affected by any increase or decrease in the value of the stock.

[2] *E. g.*, Delaware Laws 1778, c. 29b; New Jersey, Act of Dec. 11, 1778, N. J. Rev. Laws 40 (Paterson ed. 1800). Compare North Carolina Laws, Session of April 14, 1778, c. 5, calling for confiscation of the estates of certain persons "inimical to the United States," but specifically providing that members of their families should be allowed that portion of the estate forfeited which they might have enjoyed had the owner died intestate. See also *Bayard* v. *Singleton*, 1 Martin's N. C. Rep. 42 (1787). And see Comment, The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification, 54 Calif. L. Rev. 212, 214, 216 (1966).

disqualifying it from doing business with the State of New York is one way of reaching the economic interest of the recalcitrant president.[3] If, as I felt in *Spevack* v. *Klein*, 385 U. S. 511, placing the penalty of disbarment on a lawyer for invoking the Self-Incrimination Clause is unconstitutional, so is placing a monetary penalty on a businessman for doing the same.[4] Reducing the value of appellant corporation by putting it on the State's blacklist is a penalty which every stockholder suffers. If New York provided that where a businessman invokes the Self-Incrimination Clause of the Fifth Amendment

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[3] Damage to shareholders which results indirectly from damage done to the corporation can, of course, be rectified through suit by the corporation itself or by a stockholder's derivative action. *E. g.*, *Paulson* v. *Margolis*, 234 App. Div. 496, 255 N. Y. S. 568 (Sup. Ct. 1932). See generally Ballantine, Corporations 333–339 (1946); 13 Fletcher Cyclopedia, Corporations §§ 5908–5911 (1961). There is no indication in the opinion of the New York Court of Appeals that that remedy is inappropriate on the facts of this case.

[4] The fact that appellant may petition the New York courts for discretionary relief under § 2603 of the New York Public Authorities Law does not cure the defect. For appellant's claim is that its disqualification was improper, and that it was penalized pursuant to an unconstitutional statute. Its remedy cannot be limited by § 2603, which was construed by the New York Court of Appeals below to grant the state courts discretion to afford relief from a proper disqualification when the application of the statute would cause an unnecessary hardship. Indeed, § 2603 by its terms does not even involve a review of the basis for the disqualification, but provides that any disqualified corporation may apply to the New York Supreme Court to discontinue the disqualification:

"Such application shall be in the form of a petition setting forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification . . . ."

he shall forfeit, say, $10,000, the law would plainly be unconstitutional as exacting a penalty for asserting a constitutional privilege. What New York could not do directly, it may not do indirectly. Yet penalizing this man's family corporation for his assertion of immunity has precisely that effect.

The Supremacy Clause of the Constitution (Art. VI, cl. 2) gives the Fifth Amendment, now applicable to the States by reason of the Fourteenth, controlling authority over New York's law.

ROBERTS *v.* RUSSELL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 920, Misc. Decided June 10, 1968.

Bruton v. *United States*, 391 U. S. 123, which overruled *Delli Paoli* v. *United States*, 352 U. S. 232, and held that, despite instructions to the jury to disregard implicating statements in determining a codefendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violates the codefendant's Sixth Amendment right to cross-examination, is to be applied retroactively, both to state and federal prosecutions.

Certiorari granted; judgment vacated and remanded.

George F. McCanless, Attorney General of Tennessee, and *Paul E. Jennings*, Assistant Attorney General, for respondent.

PER CURIAM.

In *Bruton* v. *United States*, 391 U. S. 123, decided May 20, 1968, we overruled *Delli Paoli* v. *United States*, 352 U. S. 232, and held that, despite instructions to the jury to disregard the implicating statements in determining the codefendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violated the codefendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. This case presents the question whether *Bruton* is to be applied retroactively. We hold that it is.

The facts parallel the facts in *Bruton*. The petitioner was convicted by a jury of armed robbery at a joint trial with one Rappe in Davidson County, Tennessee. A police officer testified that Rappe orally confessed to him that petitioner and Rappe committed the crime.

The trial judge instructed the jury that Rappe's confession was admissible against her but that her statements implicating petitioner were not to be considered in determining petitioner's guilt or innocence. The Tennessee Supreme Court affirmed petitioner's conviction. Petitioner filed a proceeding in federal habeas corpus in the United States District Court for the Middle District of Tennessee. That court relied on *Delli Paoli* and denied relief. The Court of Appeals for the Sixth Circuit affirmed.

Although *Bruton* involved a federal prosecution and this is a state prosecution, the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is made applicable to the States by the Fourteenth Amendment. *Pointer* v. *Texas,* 380 U. S. 400; *Douglas* v. *Alabama,* 380 U. S. 415.

"We have . . . retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial." *Stovall* v. *Denno,* 388 U. S. 293, 298. See *Jackson* v. *Denno,* 378 U. S. 368; *Gideon* v. *Wainwright,* 372 U. S. 335; *Reck* v. *Pate,* 367 U. S. 433; *Linkletter* v. *Walker,* 381 U. S. 618, 639, n. 20; *Johnson* v. *New Jersey,* 384 U. S. 719, 727–728; cf. *Brookhart* v. *Janis,* 384 U. S. 1. Despite the cautionary instruction, the admission of a defendant's confession which implicates a codefendant results in such a "serious flaw." The retroactivity of the holding in *Bruton* is therefore required; the error "went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination" of his guilt or innocence. *Linkletter* v. *Walker, supra,* at 639, n. 20. As we said in *Bruton:*

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations

> of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial." 391 U. S., at 135–136.

Due regard for countervailing considerations—reliance on the old standard of *Delli Paoli* and the impact of retroactivity upon the administration of justice, *Stovall* v. *Denno, supra,* at 298—does not counsel against retroactivity of *Bruton.* The element of reliance is not persuasive, for *Delli Paoli* has been under attack from its inception and many courts have in fact rejected it. See *Bruton* v. *United States, supra,* at 128–135 and nn. 4, 8, 10. And even if the impact of retroactivity may be significant, the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court for further consideration in light of *Bruton* v. *United States, supra.*

It is so ordered.

MR. JUSTICE BLACK concurs in the Court's holding as to retroactivity for the reasons given in his dissent in *Linkletter* v. *Walker,* 381 U. S. 618, 640, and not for the reasons given in the Court's opinion today.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States,* 391 U. S. 123, 138 (1968).

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JOHNSON PRODUCTS, INC. *v.* CITY COUNCIL OF MEDFORD ET AL.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 1398. Decided June 10, 1968.

353 Mass. 540, 233 N. E. 2d 316, appeal dismissed and certiorari denied.

David Berman for appellant.

Arthur V. Getchell for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

PERLA *v.* NEW YORK ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 1407. Decided June 10, 1968.

Certiorari granted; 21 N. Y. 2d 608, 237 N. E. 2d 215, reversed.

Herald Price Fahringer and *Eugene Gressman* for petitioner.

Louis J. Lefkowitz, Attorney General of New York, *pro se*, *Ruth Kessler Toch*, Solicitor General, and *Julius L. Sackman*, Assistant Attorney General, for respondents.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Gardner* v. *Broderick*, *ante*, p. 273.

BUJESE *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 440, Misc. Decided June 10, 1968.

Certiorari granted; 378 F. 2d 719, vacated and remanded.

Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg, and *Marshall Tamor Golding* for the United States.

PER CURIAM.

The motion to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals for the Second Circuit is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States,* 391 U. S. 123. See *Roberts* v. *Russell, ante,* p. 293.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States,* 391 U. S. 123, 138 (1968).

FIELDS *v.* DEPARTMENT OF SOCIAL WELFARE.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 1637, Misc. Decided June 10, 1968.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

SCHNEBLE ET AL. *v.* FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 1070, Misc. Decided June 10, 1968.

Certiorari granted; 201 So. 2d 881, vacated and remanded.

Earl Faircloth, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

PER CURIAM.

The motion to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of Florida is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States*, 391 U. S. 123. See *Roberts* v. *Russell*, *ante*, p. 293.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States*, 391 U. S. 123, 138 (1968).

BOGART *v.* CALIFORNIA.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 1221, Misc. Decided June 10, 1968.

Appeal dismissed and certiorari denied.

Peter D. Bogart for petitioner.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

JONES *v.* UNITED STATES.

ON PETITION FOR REHEARING.

No. 135. Decided June 10, 1968.

Rehearing granted; certiorari granted; 374 F. 2d 414, vacated and remanded.

Herbert Monte Levy for petitioner.

Solicitor General Marshall, Assistant Attorney General Vinson, and *Philip R. Monahan* for the United States.

PER CURIAM.

The petition for rehearing is granted and the order denying the petition for writ of certiorari, 389 U. S. 835, is set aside. The petition for a writ of certiorari is granted. The judgment of the Court of Appeals for the Second Circuit is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States,* 391 U. S. 123. See *Roberts* v. *Russell, ante,* p. 293.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States,* 391 U. S. 123, 138 (1968).

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

PICKENS *v.* OLIVER, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 1076. Decided June 10, 1968.

Certiorari granted; vacated and remanded.

George T. Davis for petitioner.

Thomas C. Lynch, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Derald E. Granberg*, Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed further *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of California is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States*, 391 U. S. 123. See *Roberts* v. *Russell*, *ante*, p. 293.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States*, 391 U. S. 123, 138 (1968).

SANTORO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1219. Decided June 10, 1968.

Certiorari granted; 388 F. 2d 113, vacated and remanded.

Robert S. Bailey for petitioner.

Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg, and *Kirby W. Patterson* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment of the Court of Appeals for the Ninth Circuit is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States,* 391 U. S. 123. See *Roberts* v. *Russell, ante,* p. 293.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States,* 391 U. S. 123, 138 (1968).

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

JONES *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 1255. Decided June 10, 1968.

251 La. 431, 204 So. 2d 775, appeal dismissed.

Billy R. Pesnell for appellant.

Jack P. F. Gremillion, Attorney General of Louisiana, and *William P. Schuler*, Second Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

THE CHIEF JUSTICE would dismiss the appeal for want of jurisdiction, treat the papers submitted as a petition for a writ of certiorari, and grant the petition for a writ of certiorari.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

NELSON *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 78, Misc. Decided June 10, 1968.

Certiorari granted; 375 F. 2d 739, vacated and remanded.

Solicitor General Marshall, Assistant Attorney General Vinson, and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The motion to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals for the Ninth Circuit is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States,* 391 U. S. 123. See *Roberts* v. *Russell, ante,* p. 293.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States,* 391 U. S. 123, 138 (1968).

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

HUNT *v.* CONNECTICUT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT.

No. 117, Misc. Decided June 10, 1968.

Certiorari granted; 154 Conn. 517, 227 A. 2d 69, vacated and remanded.

James W. Marshall for petitioner.

David B. Salzman for respondent.

PER CURIAM.

The motion to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of Connecticut is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States*, 391 U. S. 123. See *Roberts* v. *Russell*, *ante*, p. 293.

MR. JUSTICE BLACK dissents.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States*, 391 U. S. 123, 138 (1968).

SERIO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 200, Misc. Decided June 10, 1968.

Certiorari granted; 126 U. S. App. D. C. 297, 377 F. 2d 936, vacated and remanded.

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg, and *Paul C. Summitt* for the United States.

PER CURIAM.

The motion to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States,* 391 U. S. 123. See *Roberts* v. *Russell, ante,* p. 293.

MR. JUSTICE BLACK dissents.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States,* 391 U. S. 123, 138 (1968).

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

WILLIAMS *v.* FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

No. 279, Misc. Decided June 10, 1968.

Certiorari granted; vacated and remanded.

Earl Faircloth, Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the District Court of Appeal of Florida, First District, is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States,* 391 U. S. 123. See *Roberts* v. *Russell, ante,* p. 293.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States,* 391 U. S. 123, 138 (1968).

HILLMAN *v.* FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

No. 443, Misc. Decided June 10, 1968.

Certiorari granted; vacated and remanded.

Earl Faircloth, Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the District Court of Appeal of Florida, First District, is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States,* 391 U. S. 123. See *Roberts* v. *Russell, ante,* p. 293.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States,* 391 U. S. 123, 138 (1968).

McCARTY ET AL. *v.* KANSAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 548, Misc. Decided June 10, 1968.

199 Kan. 116, 427 P. 2d 616; certiorari granted with respect to petitioner Boyd, judgment vacated and remanded; certiorari denied with respect to petitioner McCarty.

Robert C. Londerholm, Attorney General of Kansas, and *J. Richard Foth, Richard E. Oxandale,* and *Daniel D. Metz,* Assistant Attorneys General, for respondent.

PER CURIAM.

The motion to proceed *in forma pauperis* and the petition for a writ of certiorari are granted with respect to petitioner Boyd. The judgment of the Kansas Supreme Court is vacated and the case is remanded for further consideration in light of *Bruton* v. *United States,* 391 U. S. 123. See *Roberts* v. *Russell, ante,* p. 293. The petition for a writ of certiorari with respect to petitioner McCarty is denied.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States,* 391 U. S. 123, 138 (1968).

Syllabus.

KING, COMMISSIONER, DEPARTMENT OF PENSIONS AND SECURITY, ET AL. *v.* SMITH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 949. Argued April 23, 1968.—Decided June 17, 1968.

Under the Aid to Families With Dependent Children Program (AFDC) established by the Social Security Act of 1935 funds are made available for a "dependent child" largely by the Federal Government, on a matching fund basis, with the participating State administering the program in conformity with the Act and regulations of the Department of Health, Education, and Welfare (HEW). Section 406 (a) of the Act defines a "dependent child" as one who has been deprived of "parental" support or care by reason of the death, continued absence, or incapacity of a "parent," and insofar as relevant in this case aid can be granted under the provision only if a "parent" of the needy child is continually absent from the home. The Act requires that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals . . . ." 42 U. S. C. § 602 (a)(9). Alabama, which like all other States, participates in the AFDC program, in 1964 promulgated its "substitute father" regulation under which AFDC payments are denied to the children of a mother who "cohabits" in or outside her home with an able-bodied man, a "substitute father" being considered a non-absent parent within the federal statute. The regulation applies regardless of whether the man is the children's father, is obliged to contribute to their support, or in fact does so. The AFDC aid which appellee Mrs. Smith and her four children, who reside in Alabama, for several years had received was terminated in October 1966 solely because of the substitute father regulation on the ground that a Mr. Williams came to her home on weekends and had sexual relations with her. Mr. Williams is not the father of any of her children, is not obliged by state law to support them, and does not do so. Appellees thereupon brought this class action in the District Court against appellants, officers, and members of the Alabama Board of Pensions and Security for declaratory and injunctive relief against the substitute father regulation. The State contended that the regulation simply defines who is a non-absent "parent" under the Act, is a legitimate way of allocating

its limited resources available for AFDC assistance, discourages illicit sexual relationships and illegitimate births, and treats informal "married" couples like ordinary married couples who are ineligible for AFDC aid so long as their father is in the home. The District Court found the regulation inconsistent with the Act and the Equal Protection Clause. *Held:* Alabama's substitute father regulation is invalid because it defines "parent" in a manner that is inconsistent with § 406 (a) of the Social Security Act, and in denying AFDC assistance to appellees on the basis of the invalid regulation Alabama has breached its federally imposed obligation to furnish aid to families with dependent children with reasonable promptness to all eligible individuals. Pp. 320–334.

(a) Insofar as Alabama's substitute father regulation (which has no relation to the need of the dependent child) is based on the State's asserted interest in discouraging illicit sexual behavior and illegitimacy it plainly conflicts with federal law and policy. Under HEW's "Flemming Ruling" as modified by amendments to the Social Security Act, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures punishing dependent children, whose protection is AFDC's paramount goal. Pp. 320–327.

(b) Congress meant by the term "parent" in § 406 (a) of the Act an individual who owed the child a state-imposed duty of support, and Alabama may not therefore disqualify a child from AFDC aid on the basis of a substitute father who has no such duty. Pp. 327–333.

277 F. Supp. 31, affirmed.

Mary Lee Stapp, Assistant Attorney General of Alabama, argued the cause for appellants. With her on the briefs were *MacDonald Gallion,* Attorney General, and *Carol F. Miller,* Assistant Attorney General.

Martin Garbus argued the cause and filed a brief for appellees.

Briefs of *amici curiae,* urging affirmance, were filed by *Jack Greenberg, James M. Nabrit III, Leroy D. Clark,* and *Charles Stephen Ralston* for the NAACP Legal Defense and Educational Fund, Inc., et al., and by *Helen L. Buttenwieser* and *Ephraim London* for the Child Welfare League of America, Inc., et al.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

Alabama, together with every other State, Puerto Rico, the Virgin Islands, the District of Columbia, and Guam, participates in the Federal Government's Aid to Families With Dependent Children (AFDC) program, which was established by the Social Security Act of 1935.[1] 49 Stat. 620, as amended, 42 U. S. C. §§ 301–1394. This appeal presents the question whether a regulation of the Alabama Department of Pensions and Security, employed in that Department's administration of the State's federally funded AFDC program, is consistent with Subchapter IV of the Social Security Act, 42 U. S. C. §§ 601–609, and with the Equal Protection Clause of the Fourteenth Amendment. At issue is the validity of Alabama's so-called "substitute father" regulation which denies AFDC payments to the children of a mother who "cohabits" in or outside her home with any single or married able-bodied man. Appellees brought this class action against appellants, officers, and members of the Alabama Board of Pensions and Security, in the United States District Court for the Middle District of Alabama, under 42 U. S. C. § 1983,[2] seeking declaratory and injunctive relief. A properly convened three-judge Dis-

[1] The program was originally known as "Aid to Dependent Children." 49 Stat. 627. Alabama's program still bears this title. In the 1962 amendments to the Act, however, the name of the program was changed to "Aid and Services to Needy Families With Children," 76 Stat. 185. Throughout this opinion, the program will be referred to as "Aid to Families With Dependent Children," or AFDC.

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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trict Court [3] correctly adjudicated the merits of the controversy without requiring appellees to exhaust state administrative remedies,[4] and found the regulation to be inconsistent with the Social Security Act and the Equal Protection Clause.[5] We noted probable jurisdiction, 390

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[3] Since appellees sought injunctive relief restraining the appellant state officials from the enforcement, operation, and execution of a statewide regulation on the ground of its unconstitutionality, the three-judge court was properly convened pursuant to 28 U. S. C. § 2281. See *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341, 343, n. 3 (1951). See also *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73 (1960); *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535 (1954). Jurisdiction was conferred on the court by 28 U. S. C. §§ 1343 (3) and (4). The decision we announce today holds Alabama's substitute father regulation invalid as inconsistent with Subchapter IV of the Social Security Act. We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts. See generally Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

[4] We reject appellants' argument that appellees were required to exhaust their administrative remedies prior to bringing this action. Pursuant to the requirement of the Social Security Act that States must grant AFDC applicants who are denied aid "an opportunity for a fair hearing before the State agency," 42 U. S. C. § 602 (a) (4) (1964 ed., Supp. II), Alabama provides for administrative review of such denials. Alabama Manual for Administration of Public Assistance, pt. I, § II, pp. V–5 to V–12. Decisions of this Court, however, establish that a plaintiff in an action brought under the Civil Rights Act, 42 U. S. C. § 1983, 28 U. S. C. § 1343, is not required to exhaust administrative remedies, where the constitutional challenge is sufficiently substantial, as here, to require the convening of a three-judge court. *Damico* v. *California*, 389 U. S. 416 (1967). See also *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Monroe* v. *Pape*, 365 U. S. 167, 180–183 (1961). For a general discussion of review in the federal courts of state welfare practices, see Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

[5] *Smith* v. *King*, 277 F. Supp. 31 (D. C. M. D. Ala. 1967).

U. S. 903 (1968), and, for reasons which will appear, we affirm without reaching the constitutional issue.

I.

The AFDC program is one of three major categorical public assistance programs established by the Social Security Act of 1935. See U. S. Advisory Commission Report on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance 5–7 (1964) (hereafter cited as Advisory Commission Report). The category singled out for welfare assistance by AFDC is the "dependent child," who is defined in § 406 of the Act, 49 Stat. 629, as amended, 42 U. S. C. § 606 (a) (1964 ed., Supp. II), as an age-qualified [6] "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" any one of several listed relatives. Under this provision, and, insofar as relevant here, aid can be granted only if "a parent" of the needy child is continually absent from the home.[7] Alabama considers a man who qualifies as a "substitute father" under its regulation to be a nonabsent parent within the federal statute. The State therefore denies aid to an otherwise eligible needy child on the basis that his substitute parent is not absent from the home.

Under the Alabama regulation, an "able-bodied man, married or single, is considered a substitute father of *all*

[6] A needy child, to qualify for the AFDC assistance, must be under the age of 18, or under the age of 21 and a student, as defined by HEW. 79 Stat. 422, 42 U. S. C. §§ 606 (a) (2) (A) and (B) (1964 ed., Supp. II).

[7] The States are also permitted to consider as dependent children needy children who have an unemployed parent, as is discussed in n. 13, *infra*, and needy children without a parent who have under certain circumstances been placed in foster homes or child care institutions. See 42 U. S. C. §§ 607, 608.

the children of the applicant . . . mother" in three different situations: (1) if "he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation"; or (2) if "he visits [the home] frequently for the purpose of cohabiting with the child's natural or adoptive mother"; or (3) if "he does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere." [8] Whether the substitute father is actually the father of the children is irrelevant. It is also irrelevant whether he is legally obligated to support the children, and whether he does in fact contribute to their support. What is determinative is simply whether he "cohabits" with the mother.[9]

The testimony below by officials responsible for the administration of Alabama's AFDC program establishes that "cohabitation," as used in the regulation, means essentially that the man and woman have "frequent" or "continuing" sexual relations. With regard to how frequent or continual these relations must be, the testimony is conflicting. One state official testified that the regulation applied only if the parties had sex at least once a week; another thought once every three months would suffice; and still another believed once every six months sufficient. The regulation itself provides that pregnancy or a baby under six months of age is prima facie evidence of a substitute father.

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[8] Alabama Manual for Administration of Public Assistance, pt. I, c. II, § VI.

[9] Under the regulation, when "there appears to be a substitute father," the mother bears the burden of proving that she has discontinued her relationship with the man before her AFDC assistance will be resumed. The mother's claim of discontinuance must be "corroborated by at least two acceptable references in a position to know. Examples of acceptable references are: law-enforcement officials; ministers; neighbors; grocers." There is no hearing prior to the termination of aid, but an applicant denied aid may secure state administrative review.

Between June 1964, when Alabama's substitute father regulation became effective, and January 1967, the total number of AFDC recipients in the State declined by about 20,000 persons, and the number of children recipients by about 16,000, or 22%. As applied in this case, the regulation has caused the termination of all AFDC payments to the appellees, Mrs. Sylvester Smith and her four minor children.

Mrs. Smith and her four children, ages 14, 12, 11, and 9, reside in Dallas County, Alabama. For several years prior to October 1, 1966, they had received aid under the AFDC program. By notice dated October 11, 1966, they were removed from the list of persons eligible to receive such aid. This action was taken by the Dallas County welfare authorities pursuant to the substitute father regulation, on the ground that a Mr. Williams came to her home on weekends and had sexual relations with her.

Three of Mrs. Smith's children have not received parental support or care from a father since their natural father's death in 1955. The fourth child's father left home in 1963, and the child has not received the support or care of his father since then. All the children live in the home of their mother, and except for the substitute father regulation are eligible for aid. The family is not receiving any other type of public assistance, and has been living, since the termination of AFDC payments, on Mrs. Smith's salary of between $16 and $20 per week which she earns working from 3:30 a. m. to 12 noon as a cook and waitress.

Mr. Williams, the alleged "substitute father" of Mrs. Smith's children, has nine children of his own and lives with his wife and family, all of whom are dependent upon him for support. Mr. Williams is not the father of any of Mrs. Smith's children. He is not legally obligated, under Alabama law, to support any of Mrs. Smith's

children.[10] Further, he is not willing or able to support the Smith children, and does not in fact support them. His wife is required to work to help support the Williams household.

II.

The AFDC program is based on a scheme of cooperative federalism. See generally Advisory Commission Report, *supra*, at 1–59. It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW). 49 Stat. 627,

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[10] Under Alabama statutes, a legal duty of support is imposed only upon a "parent," who is defined as (1) a "natural legal parent," (2) one who has "legally acquired the custody of" the child, and (3) "the father of such child, . . . though born out of lawful wedlock." Ala. Code, Tit. 34, §§ 89, 90; Ala. Code, Tit. 27, §§ 12 (1), 12 (4) (1965 Supp.). *Law* v. *State*, 238 Ala. 428, 191 So. 803 (1939). The Alabama courts have interpreted the statute to impose a legal duty of support upon one who has "publicly acknowledged or treated the child as his own, in a manner to indicate his voluntary assumption of parenthood" irrespective of whether the alleged parent is in fact the child's real father. *Law* v. *State*, 238 Ala. 428, 430, 191 So. 803, 805 (1939). It seems clear, however, that even a stepfather who is not the child's natural parent and has not acquired legal custody of him is under an obligation of support only if he has made this "voluntary assumption of parenthood." See *Chandler* v. *Whatley*, 238 Ala. 206, 189 So. 751 (1939); *Englehardt* v. *Yung's Heirs*, 76 Ala. 534, 540 (1884); *Nicholas* v. *State*, 32 Ala. App. 574, 28 So. 2d 422 (1946). Further, the Alabama Supreme Court has emphasized that the alleged father's intention to support the child, requisite to a finding of voluntary assumption of parenthood, "should not be slightly [*sic*] nor hastily inferred . . . ." *Englehardt* v. *Yung's Heirs*, 76 Ala. 534, 540 (1884).

42 U. S. C. §§ 601, 602, 603, and 604. See Advisory Commission Report, *supra*, at 21–23.[11] The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW. 49 Stat. 627, as amended, 42 U. S. C. § 602 (1964 ed., Supp. II). See also HEW, Handbook of Public Assistance Administration, pt. IV, §§ 2200, 2300 (hereafter cited as Handbook).[12]

One of the statutory requirements is that "aid to families with dependent children . . . shall be furnished with reasonable promptness to all eligible individuals . . . ." 64 Stat. 550, as amended, 42 U. S. C. § 602 (a)(9) (1964 ed., Supp. II). As noted above, § 406 (a) of the Act defines a "dependent child" as one who has been deprived of "parental" support or care by reason of the death, continued absence, or incapacity of a "parent." 42 U. S. C. § 606 (a) (1964 ed., Supp. II). In combination, these two provisions of the Act clearly require participating States to furnish aid to families with children who have a parent absent from the home, if such families are in other respects eligible. See also Handbook, pt. IV, § 2200 (b)(4).

The State argues that its substitute father regulation simply defines who is a nonabsent "parent" under

[11] Alabama's substitute father regulation has been neither approved nor disapproved by HEW. There has, however, been considerable correspondence between the Alabama and federal authorities concerning the regulation, as is discussed in n. 23, *infra*.

[12] Unless HEW approves the plan, federal funds will not be made available for its implementation. 42 U. S. C. § 601. Further, HEW may entirely or partially terminate federal payments if "in the administration of the [state] plan there is a failure to comply substantially with any provision required by section 602 (a) of this title to be included in the plan." § 245, 81 Stat. 918, as amended, 42 U. S. C. § 604 (1964 ed., Supp. III). See generally Advisory Commission Report, *supra*, at 61–80.

§ 406 (a) of the Social Security Act. 42 U. S. C. § 606 (a) (1964 ed., Supp. II). The State submits that the regulation is a legitimate way of allocating its limited resources available for AFDC assistance, in that it reduces the caseload of its social workers and provides increased benefits to those still eligible for assistance. Two state interests are asserted in support of the allocation of AFDC assistance achieved by the regulation: first, it discourages illicit sexual relationships and illegitimate births; second, it puts families in which there is an informal "marital" relationship on a par with those in which there is an ordinary marital relationship, because families of the latter sort are not eligible for AFDC assistance.[13]

We think it well to note at the outset what is *not* involved in this case. There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need[14] and to determine the level of benefits by the

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[13] Commencing in 1961, federal matching funds have been made available under the AFDC subchapter of the Social Security Act for a State which grants assistance to needy children who have two able-bodied parents living in the home, but who have been "deprived of parental support or care by reason of the unemployment . . . of a parent." 42 U. S. C. § 607. Participation in this program for aid to dependent children of unemployed parents is not obligatory on the States, and the Court has been advised that only 21 States participate. Alabama does not participate.

[14] HEW's Handbook, in pt. IV, § 3120, provides that: "A needy individual . . . [under AFDC] is one who does not have income and resources sufficient to assure economic security, *the standard of which must be defined by each State.* The act recognizes that *the standard so defined depends upon the conditions existing in each State.*" (Emphasis added.) The legislative history of the Act also makes clear that the States have power to determine who is "needy" for purposes of AFDC. Thus the Reports of the House

amount of funds it devotes to the program.[15] See Advisory Commission Report, *supra,* at 30–59. Further, there is no question that regular and actual contributions to a needy child, including contributions from the kind of person Alabama calls a substitute father, can be taken into account in determining whether the child is needy.[16] In other words, if by reason of such a man's contribution,

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Ways and Means Committee and Senate Finance Committee make clear that the States are free to impose eligibility requirements as to "means." H. R. Rep. No. 615, 74th Cong., 1st Sess., 24 (1935); S. Rep. No. 628, 74th Cong., 1st Sess., 36 (1935). The floor debates corroborate that this was Congress' intent. For example, Representative Vinson explained that "need is to be determined under the State law." 79 Cong. Rec. 5471 (1935).

[15] The rather complicated formula for federal funding is contained in 42 U. S. C. § 603. The level of benefits is within the State's discretion, but the Federal Government's contribution is a varying percentage of the total AFDC expenditures within each State. See H. R. Rep. No. 615, 74th Cong., 1st Sess., 12, 24 (1935); S. Rep. No. 628, 74th Cong., 1st Sess., 4, 36 (1935). The benefit levels vary greatly from State to State. For example, for May 1967, the average payment to a family under AFDC was about $224 in New Jersey, $221 in New York, $39 in Mississippi, $20 in Puerto Rico, and $53 in Alabama. Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., pt. 1, 296–297 (1967). See generally Harvith, Federal Equal Protection and Welfare Assistance, 31 Albany L. Rev. 210, 226–227 (1967).

[16] Indeed, the Act requires that in determining need the state agency "shall . . . take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . ." 42 U. S. C. § 602 (a)(7) (1964 ed., Supp. II). Regulations of HEW, which clearly comport with the statute, restrict the resources which are to be taken into account under § 602 to those "that are, in fact, available to an applicant or recipient for current use on a regular basis . . . ." This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual. Handbook, pt. IV, § 3131 (7). See also §§ 3120, 3123, 3124, 3131 (10), and 3131 (11).

the child is not in financial need, the child would be ineligible for AFDC assistance without regard to the substitute father rule. The appellees here, however, meet Alabama's need requirements; their alleged substitute father makes no contribution to their support; and they have been denied assistance solely on the basis of the substitute father regulation. Further, the regulation itself is unrelated to need, because the actual financial situation of the family is irrelevant in determining the existence of a substitute father.

Also not involved in this case is the question of Alabama's general power to deal with conduct it regards as immoral and with the problem of illegitimacy. This appeal raises only the question whether the State may deal with these problems in the manner that it has here—by flatly denying AFDC assistance to otherwise eligible dependent children.

Alabama's argument based on its interests in discouraging immorality and illegitimacy would have been quite relevant at one time in the history of the AFDC program. However, subsequent developments clearly establish that these state interests are not presently legitimate justifications for AFDC disqualification. Insofar as this or any similar regulation is based on the State's asserted interest in discouraging illicit sexual behavior and illegitimacy, it plainly conflicts with federal law and policy.

A significant characteristic of public welfare programs during the last half of the 19th century in this country was their preference for the "worthy" poor. Some poor persons were thought worthy of public assistance, and others were thought unworthy because of their supposed incapacity for "moral regeneration." H. Leyendecker, Problems and Policy in Public Assistance 45–57 (1955); Wedemeyer & Moore, The American Welfare System, 54 Calif. L. Rev. 326, 327–328 (1966). This worthy-person concept characterized the mothers' pension wel-

fare programs,[17] which were the precursors of AFDC. See W. Bell, Aid to Dependent Children 3–19 (1965). Benefits under the mothers' pension programs, accordingly, were customarily restricted to widows who were considered morally fit. See Bell, *supra,* at 7; Leyendecker, *supra,* at 53.

In this social context it is not surprising that both the House and Senate Committee Reports on the Social Security Act of 1935 indicate that States participating in AFDC were free to impose eligibility requirements relating to the "moral character" of applicants. H. R. Rep. No. 615, 74th Cong., 1st Sess., 24 (1935); S. Rep. No. 628, 74th Cong., 1st Sess., 36 (1935). See also 79 Cong. Rec. 5679 (statement by Representative Jenkins) (1935). During the following years, many state AFDC plans included provisions making ineligible for assistance dependent children not living in "suitable homes." See Bell, *supra,* at 29–136 (1965). As applied, these suitable home provisions frequently disqualified children on the basis of the alleged immoral behavior of their mothers. *Ibid.*[18]

In the 1940's, suitable home provisions came under increasing attack. Critics argued, for example, that such disqualification provisions undermined a mother's confidence and authority, thereby promoting continued dependency; that they forced destitute mothers into increased immorality as a means of earning money; that they were habitually used to disguise systematic racial

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[17] For a discussion of the mothers' pension welfare programs, see J. Brown, Public Relief 1929–1939, at 26–32 (1940).

[18] Bell quotes a case record, for example, where a mother whose conduct with men displeased a social worker was required, as a condition of continued assistance, to sign an affidavit stating that, "I . . . do hereby promise and agree that until such time as the following agreement is rescinded, I will not have any male callers coming to my home nor meeting me elsewhere under improper conditions." Bell, *supra,* at 48.

discrimination; and that they senselessly punished impoverished children on the basis of their mothers' behavior, while inconsistently permitting them to remain in the allegedly unsuitable homes. In 1945, the predecessor of HEW produced a state letter arguing against suitable home provisions and recommending their abolition. See Bell, *supra,* at 51. Although 15 States abolished their provisions during the following decade, numerous other States retained them. *Ibid.*

In the 1950's, matters became further complicated by pressures in numerous States to disqualify illegitimate children from AFDC assistance. Attempts were made in at least 18 States to enact laws excluding children on the basis of their own or their siblings' birth status. See Bell, *supra,* at 72–73. All but three attempts failed to pass the state legislatures, and two of the three successful bills were vetoed by the governors of the States involved. *Ibid.* In 1960, the federal agency strongly disapproved of illegitimacy disqualifications. See Bell, *supra,* at 73–74.

Nonetheless, in 1960, Louisiana enacted legislation requiring, as a condition precedent for AFDC eligibility, that the home of a dependent child be "suitable," and specifying that any home in which an illegitimate child had been born subsequent to the receipt of public assistance would be considered unsuitable. Louisiana Acts, No. 251 (1960). In the summer of 1960, approximately 23,000 children were dropped from Louisiana's AFDC rolls. Bell, *supra,* at 137. In disapproving this legislation, then Secretary of Health, Education, and Welfare Flemming issued what is now known as the Flemming Ruling, stating that as of July 1, 1961,

> *"A State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions*

> *in which the child lives are unsuitable, while the child continues to reside in the home.* Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere." [19]

Congress quickly approved the Flemming Ruling, while extending until September 1, 1962, the time for state compliance. 75 Stat. 77, as amended 42 U. S. C. § 604 (b).[20] At the same time, Congress acted to implement the ruling by providing, on a temporary basis, that dependent children could receive AFDC assistance if they were placed in foster homes after a court determination that their former homes were, as the Senate Report stated, "unsuitable because of the immoral or negligent behavior of the parent." S. Rep. No. 165,

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[19] State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare. (Emphasis added.)

[20] The Senate Finance Committee Report explained the purpose of the amendment as follows:

"The Department of Health, Education, and Welfare in January 1961 advised the State agencies administering title IV of the Social Security Act—aid to dependent children—that after June 30, 1961, grants to States would not be available if the State terminated assistance to children in a home determined to be unsuitable unless the State made other provision for the children affected. Section 4 of your committee's bill would provide that the requirement made by the Department of Health, Education, and Welfare would not become effective in States which took the type of action described, as the result of a State statute requiring such action, before the 61st day after the end of the regular session of such State's legislature, such regular session beginning following the enactment of this section. One or two of the States affected by the Department's ruling do not have regular sessions of their legislatures in 1961 and would accordingly be safeguarded against the withholding of funds until such time as their legislatures have had regular sessions and have had an opportunity to modify the State statutes involved." S. Rep. No. 165, 87th Cong., 1st Sess., 6 (1961).

87th Cong., 1st Sess., 6 (1961). See 75 Stat. 76, as amended, 42 U. S. C. § 608.[21]

In 1962, Congress made permanent the provision for AFDC assistance to children placed in foster homes and extended such coverage to include children placed in child-care institutions. 76 Stat. 180, 185, 193, 196, 207, 42 U. S. C. § 608. See S. Rep. No. 1589, 87th Cong., 2d Sess., 13 (1962). At the same time, Congress modified the Flemming Ruling by amending § 404 (b) of the Act. As amended, the statute permits States to disqualify from AFDC aid children who live in unsuitable homes, provided they are granted other "adequate care and assistance." 76 Stat. 189, 42 U. S. C. § 604 (b). See S. Rep. No. 1589, 87th Cong., 2d Sess., 14 (1962).

Thus, under the 1961 and 1962 amendments to the Social Security Act, the States are permitted to remove a child from a home that is judicially determined to be so unsuitable as to "be contrary to the welfare of such child." 42 U. S. C. § 608 (a)(1). The States are also permitted to terminate AFDC assistance to a child living in an unsuitable home, if they provide other adequate care and assistance for the child under a general welfare program. 42 U. S. C. § 604 (b). See S. Rep. No. 1589, 87th Cong., 2d Sess., 14 (1962). The statutory approval of the Flemming Ruling, however, precludes the States from otherwise denying AFDC assistance to dependent children on the basis of their mothers' alleged immorality or to discourage illegitimate births.

The most recent congressional amendments to the Social Security Act further corroborate that federal public welfare policy now rests on a basis considerably more

[21] For a discussion by then Secretary of HEW Ribicoff and now Secretary Cohen concerning the 1961 amendments in relation to the Flemming Ruling, see Hearings on H. R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 294–297, 305–307 (1962).

sophisticated and enlightened than the "worthy-person" concept of earlier times. State plans are now required to provide for a rehabilitative program of improving and correcting unsuitable homes, § 402 (a), as amended by § 201 (a)(1)(B), 81 Stat. 877, 42 U. S. C. § 602 (a)(14) (1964 ed., Supp. III); § 406, as amended by § 201 (f), 81 Stat. 880, 42 U. S. C. § 606 (1964 ed., Supp. III); to provide voluntary family planning services for the purpose of reducing illegitimate births, § 402 (a), as amended by § 201 (a)(1)(C), 81 Stat. 878, 42 U. S. C. § 602 (a)(15) (1964 ed., Supp. III); and to provide a program for establishing the paternity of illegitimate children and securing support for them, § 402 (a), as amended by § 201 (a)(1)(C), 81 Stat. 878, 42 U. S. C. § 602 (a)(17) (1964 ed., Supp. III).

In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC.[22] In light of the Flemming

[22] The new emphasis on rehabilitative services began with the Kennedy Administration. President Kennedy, in his 1962 welfare message to the Congress, observed that communities that had attempted to cut down welfare expenditures through arbitrary cutbacks had met with little success, but that "communities which have tried the rehabilitative road—the road I have recommended today—have demonstrated what can be done with creative . . . programs of prevention and social rehabilitation." See Hearings on H. R. 10606 before the Senate Committee on Finance, 87th Cong., 2d Sess., 109 (1962). Some insight into the mood of the Congress that approved the Flemming Ruling in 1961 with respect to this matter is provided by an exchange during the debates on the floor of the House. Representative Gross inquired of Representative Mills, Chairman of the House Ways and Means Committee, concerning the AFDC status of illegitimate children. After a brief discussion in which Representative Mills explained that he was looking into the problem of illegitimacy, Representative Hoffman asked whether Representative Gross was taking the position that "these

Ruling and the 1961, 1962, and 1968 amendments to the Social Security Act, it is simply inconceivable, as HEW has recognized,[23] that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children. Alabama may deal with these problems by several different methods under the

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innocent children, no matter what the circumstances under which they were born, are to be deprived of the necessities of life." Representative Gross replied, "Oh, no; not at all," and agreed with Representative Hoffman's subsequent statement that the proper approach would be to attempt to prevent illegitimate births. 107 Cong. Rec. 3766 (1961). See generally Bell, *supra*, at 152–173.

[23] Both before and after the Flemming Ruling, the Alabama and federal authorities corresponded with considerable frequency concerning the State's suitable home and substitute father policies. In April 1959, HEW by letter stated that "suitable home" legislation then being proposed by Alabama raised substantial questions of conformity with the Social Security Act, because it seemed to deprive children of AFDC assistance on the basis of illegitimate births in the family. In May 1959 and again in August 1959 new suitable home policies were submitted and were rejected by HEW. Negotiations continued, and in June 1961, HEW responded that the newest legislative proposal was inconsistent with Congress' statutory approval of the Flemming Ruling because (1) assistance would be denied to children on the basis that their homes were unsuitable but they would be permitted to remain in the homes; and (2) a home could be found unsuitable simply on the basis of the child's birth status. Still later, on June 12, 1963, HEW rejected another Alabama suitable home provision on the ground that it provided for denial of AFDC assistance while the child remained in the home without providing for other "adequate care and assistance," as required by the 1962 amendment to the Federal Act. The evidence below establishes that soon after appellant King's appointment as Commissioner, he undertook a study that led to the adoption of the substitute father regulation. When this regulation was submitted to HEW, it responded that the regulation did not conform with 42 U. S. C. § 604 (b) for the same reasons as its predecessor legislative proposals. Additional correspondence ensued, but HEW never approved the regulation.

Social Security Act. But the method it has chosen plainly conflicts with the Act.

III.

Alabama's second justification for its substitute father regulation is that "there is a public interest in a State not undertaking the payment of these funds to families who because of their living arrangements would be in the same situation as if the parents were married, except for the marriage." In other words, the State argues that since in Alabama the needy children of married couples are not eligible for AFDC aid so long as their father is in the home, it is only fair that children of a mother who cohabits with a man not her husband and not their father be treated similarly. The difficulty with this argument is that it fails to take account of the circumstance that children of fathers living in the home are in a very different position from children of mothers who cohabit with men not their fathers: the child's father has a legal duty to support him, while the unrelated substitute father, at least in Alabama, does not. We believe Congress intended the term "parent" in § 406 (a) of the Act, 42 U. S. C. § 606 (a), to include only those persons with a legal duty of support.

The Social Security Act of 1935 was part of a broad legislative program to counteract the depression. Congress was deeply concerned with the dire straits in which all needy children in the Nation then found themselves.[24] In agreement with the President's Committee on Eco-

[24] See H. R. Rep. No. 615, 74th Cong., 1st Sess., 9–10 (1935) (characterizing children as "the most tragic victims of the depression"); S. Rep. No. 628, 74th Cong., 1st Sess., 16–17 (1935) (declaring that the "heart of any program for social security must be the child").

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nomic Security, the House Committee Report declared, "the core of any social plan must be the child." H. R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). The AFDC program, however, was not designed to aid all needy children. The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that "the work relief program and . . . the revival of private industry" would provide employment for their fathers. S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). As the Senate Committee Report stated: "Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family." *Ibid.* Implicit in this statement is the assumption that children would in fact be supported by the family "breadwinner."

The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. It was designed to protect what the House Report characterized as "[o]ne clearly distinguishable group of children." H. R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). This group was composed of children in families without a "breadwinner," "wage earner," or "father," as the repeated use of these terms throughout the Report of the President's Committee,[25] Committee Hearings[26] and Reports[27] and the floor debates[28] makes perfectly clear. To describe the sort of breadwinner that it had in mind, Congress employed the word

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[25] See H. R. Doc. No. 81, 74th Cong., 1st Sess., 4–5, 29–30 (1935).

[26] Hearings on H. R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 158–161, 166, 174, 262–264 (1935); Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 102, 181, 337–338, 647, 654 (1935).

[27] See H. R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935); S. Rep. No. 628, 74th Cong., 1st Sess., 17–18 (1935).

[28] See 79 Cong. Rec. 5468, 5476, 5786, 5861 (1935).

"parent." 49 Stat. 629, as amended, 42 U. S. C. § 606 (a). A child would be eligible for assistance if his parent was deceased, incapacitated or continually absent.

The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: (1) that the man did not in fact support the child; and (2) that he was not legally obligated to support the child. The State correctly observes that the fact that the man in question does not actually support the child cannot be determinative, because a natural father at home may fail actually to support his child but his presence will still render the child ineligible for assistance. On the question whether the man must be legally obligated to provide support before he can be regarded as the child's parent, the State has no such cogent answer. We think the answer is quite clear: Congress must have meant by the term "parent" an individual who owed to the child a state-imposed legal duty of support.

It is clear, as we have noted, that Congress expected "breadwinners" who secured employment would support their children. This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was legally obligated to support his children. We think it beyond reason to believe that Congress would have considered that providing employment for the paramour of a deserted mother would benefit the mother's children whom he was not obligated to support.

By a parity of reasoning, we think that Congress must have intended that the children in such a situation remain eligible for AFDC assistance notwithstanding their mother's impropriety. AFDC was intended to provide economic security for children whom Congress could not reasonably expect would be provided for by simply secur-

ing employment for family breadwinners.[29] We think it apparent that neither Congress nor any reasonable person would believe that providing employment for some man who is under no legal duty to support a child would in any way provide meaningful economic security for that child.

A contrary view would require us to assume that Congress, at the same time that it intended to provide programs for the economic security and protection of *all* children, also intended arbitrarily to leave one class of destitute children entirely without meaningful protection. Children who are told, as Alabama has told these appellees, to look for their food to a man who is not in the least obliged to support them are without meaningful protection. Such an interpretation of congressional intent would be most unreasonable, and we decline to adopt it.

Our interpretation of the term "parent" in § 406 (a) is strongly supported by the way the term is used in other sections of the Act. Section 402 (a)(10) requires that, effective July 1, 1952, a state plan must:

> "provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a *parent*." 64 Stat. 550, 42 U. S. C. § 602 (a)(10). (Emphasis added.)

The "parent" whom this provision requires to be reported to law enforcement officials is surely the same "parent" whose desertion makes a child eligible for AFDC

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[29] As the Senate Committee Report stated, AFDC was intended to provide for children who "will not be benefited through work programs or the revival of industry." S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935).

assistance in the first place. And Congress obviously did not intend that a so-called "parent" who has no legal duties of support be referred to law enforcement officials (as Alabama's own welfare regulations recognize),[30] for the very purpose of such referrals is to institute non-support proceedings. See Handbook, pt. IV, §§ 8100–8149.[31] Whatever doubt there might have been over this proposition has been completely dispelled by the 1968 amendments to the Social Security Act, which provide that the States must develop a program:

> "(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the *paternity of such child and secure support for him,* and
>
> "(ii) in the case of any child receiving such aid who has been deserted or abandoned *by his parent, to secure support for such child from such parent (or from any other person legally liable for such support)* . . . ." § 402 (a), as amended by § 201 (a)(1)(C), 81 Stat. 878, 42 U. S. C. § 602 (a)(17) (1964 ed., Supp. III). (Emphasis added.)

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[30] Alabama's own welfare regulations state: "Report parents who are legally responsible under Alabama law. These are the *natural* or *adoptive* parents of a child. A natural parent includes the father of a child born out of wedlock, if paternity has been *legally* established. It does not apply to a stepparent." Alabama Manual for Administration of Public Assistance, pt. I, c. II, p. 36.

[31] HEW requires States to give notice of desertion only with respect to persons who, "under State laws, are defined as parents . . . for the support of minor children, and against whom legal action may be taken under such laws for desertion or abandonment." Handbook, pt. IV, § 8131 (2). And, as discussed in n. 10, *supra,* the alleged substitute father in the case at bar is not legally obligated by Alabama law to support the appellee children. See also Handbook, pt. IV, § 3412 (4) (providing that a stepparent not required by state law to support a child need not be considered the child's parent).

Another provision in the 1968 amendments requires the States, effective January 1, 1969, to report to HEW any "*parent . . . against whom an order for the support and maintenance* of such [dependent] child or children has been issued by" a court, if such parent is not making the required support payments. § 402 (a), as amended by § 211 (a), 81 Stat. 896, 42 U. S. C. § 602 (a)(21) (1964 ed., Supp. III). (Emphasis added.) Still another amendment requires the States to cooperate with HEW in locating any *parent* against whom a support petition has been filed in another State, and in securing compliance with any support order issued by another State, § 402 (a), as amended by § 211 (a), 81 Stat. 897, 42 U. S. C. § 602 (a)(22) (1964 ed., Supp. III).

The pattern of this legislation could not be clearer. Every effort is to be made to locate and secure support payments from persons legally obligated to support a deserted child.[32] The underlying policy and consistency in statutory interpretation dictate that the "parent" referred to in these statutory provisions is the same parent as that in § 406 (a). The provisions seek to secure parental support in lieu of AFDC support for dependent children. Such parental support can be secured only where the parent is under a state-imposed legal duty to support the child. Children with alleged substitute parents who owe them no duty of support are entirely unprotected by these provisions. We think that these provisions corroborate the intent of Congress that the only kind of "parent," under § 406 (a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him. Consequently, if Alabama believes it

[32] Another 1968 amendment provides for the cooperation of the Internal Revenue Service in locating missing "parents." § 410, 81 Stat. 897.

necessary that it be able to disqualify a child on the basis of a man who is not under such a duty of support, its arguments should be addressed to Congress and not this Court.[33]

IV.

Alabama's substitute father regulation, as written and as applied in this case, requires the disqualification of otherwise eligible dependent children if their mother "cohabits" with a man who is not obligated by Alabama law to support the children. The regulation is therefore invalid because it defines "parent" in a manner that is inconsistent with § 406 (a) of the Social Security Act. 42 U. S. C. § 606 (a).[34] In denying AFDC assistance to appellees on the basis of this invalid regulation, Alabama has breached its federally imposed obligation to furnish "aid to families with dependent children . . . with reasonable promptness to all eligible individuals . . . ." 42 U. S. C. § 602 (a)(9) (1964 ed., Supp. II). Our conclusion makes unnecessary consideration of appellees' equal-protection claim, upon which we intimate no views.

We think it well, in concluding, to emphasize that no legitimate interest of the State of Alabama is defeated

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[33] We intimate no views whatsoever on the constitutionality of any such hypothetical legislative proposal.

[34] There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid. See *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275, 295 (1958); *Oklahoma* v. *Civil Service Comm'n*, 330 U. S. 127, 143 (1947). It is equally clear that to the extent HEW has approved any so-called "man-in-the-house" provision which conflicts with § 406 (a) of the Social Security Act, 42 U. S. C. § 606 (a), such approval is inconsistent with the controlling federal statute.

by the decision we announce today. The State's interest in discouraging illicit sexual behavior and illegitimacy may be protected by other means, subject to constitutional limitations, including state participation in AFDC rehabilitative programs. Its interest in economically allocating its limited AFDC resources may be protected by its undisputed power to set the level of benefits and the standard of need, and by its taking into account in determining whether a child is needy all actual and regular contributions to his support.

All responsible governmental agencies in the Nation today recognize the enormity and pervasiveness of social ills caused by poverty. The causes of and cures for poverty are currently the subject of much debate. We hold today only that Congress has made at least this one determination: that destitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father.

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

The Court follows the statutory route in reaching the result that I reach on constitutional grounds. It is, of course, traditional that our disposition of cases should, if possible, be on statutory rather than constitutional grounds, unless problems of statutory construction are insurmountable. *E. g., Harmon* v. *Brucker,* 355 U. S. 579, 581.

We do have, however, in this case a long-standing administrative construction that approves state AFDC plans containing a man-in-the-house provision.[1] Certainly that early administrative construction, which so far as I can ascertain has been a consistent one, is entitled

[1] See the Appendix to this opinion.

to great weight. *E. g., Power Reactor Co.* v. *Electricians,* 367 U. S. 396, 408.

The Department of Health, Education, and Welfare balked at the Alabama provision only because it reached all nonmarital sexual relations of the mother, not just nonmarital relations on a regular basis in the mother's house.[2] Since I cannot distinguish between the two categories, I reach the constitutional question.[3]

The Alabama regulation describes three situations in which needy children, otherwise eligible for relief, are to be denied financial assistance. In none of these is the child to blame. The disqualification of the family, and hence the needy child, turns upon the "sin" of the mother.[4]

First, if a man not married to the mother and not the father of the children lives in her home for purposes of cohabiting with her, the children are cast into the outer darkness.

Second, if a man who is not married to the mother and is not the father of the children visits her home for the

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[2] See discussion by the District Court in this case, *Smith* v. *King,* 277 F. Supp. 31, 36–38.

[3] Moreover, the Court's decision based on statutory construction does not completely resolve the question presented. The District Court, having found a violation of the Fourteenth Amendment, issued an unconditional injunction. Under the Court's opinion, however, Alabama is free to revive enforcement of its substitute parent regulation at any time it chooses to reject federal funds made available under the Social Security Act.

[4] Whether the mother alone could constitutionally be cut off from assistance because of her "sin" (compare *Glona* v. *American Insurance Co.,* 391 U. S. 73) is a question not presented. The aid is to the needy family, and without removing the children from their mother because of her unfitness—action not contemplated here, as far as the record indicates—there is no existing means by which Alabama can assist the children while ensuring that the mother does not benefit.

purpose of cohabiting with her, the needy children meet the same fate.

Third, if a man not married to the mother and not the father of the children cohabits with her outside the home, then the needy children are likewise denied relief. In each of these three situations the needy family is wholly cut off from AFDC assistance without considering whether the mother's paramour is in fact aiding the family, is financially able to do so, or is legally required to do so. Since there is "sin," the paramour's wealth or indigency is irrelevant.

In other words, the Alabama regulation is aimed at punishing mothers who have nonmarital sexual relations. The economic need of the children, their age, their other means of support, are all irrelevant. The standard is the so-called immorality of the mother.[5]

The other day in a comparable situation we held that the Equal Protection Clause of the Fourteenth Amendment barred discrimination against illegitimate children. We held that they cannot be denied a cause of action because they were conceived in "sin," that the making of such a disqualification was an invidious discrimination. *Levy* v. *Louisiana*, 391 U. S. 68. I would think precisely the same result should be reached here. I would say that the immorality of the mother has no rational connection with the need of her children under any welfare program.

I would affirm this judgment for the reasons more fully elaborated in the opinion of the three-judge District Court. *Smith* v. *King*, 277 F. Supp. 31, 38–40.

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[5] This penalizing the children for the sins of their mother is reminiscent of the archaic corruption of the blood, a form of bill of attainder, which I have discussed recently in a different context. *George Campbell Painting Corp.* v. *Reid, ante*, p. 289 (dissenting opinion).

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS, CONCURRING.

States which, according to HEW, currently have "man-in-the-house" policies in their plans for the Federal-State program of Aid to Families with Dependent Children.

State and effective date of approved state policy.	*Status of subsequent revisions submitted for approval and incorporation in the State's plan.*
Alabama..... Dec. 1962	Revision dated July 1964 and all subsequent revisions including an Administrative Letter of Nov. 13, 1967, are being held pending approval.
Arizona..... Nov. 1963	Latest revision incorporated May 24, 1967.
Arkansas..... Aug. 1959	
District of Columbia. Jan. 1955	A revision dated Dec. 27, 1960, was incorporated into the approved plan on Jan. 13, 1961; however, when the District's plan manual was revised and resubmitted as the State's plan, in June 1964, the "man-in-the-house" provisions were not accepted and together with subsequent revisions are still pending approval.
Florida..... July 1959	
Georgia..... April 1952	
Indiana	A "man-in-the-house" provision, not previously in the State's plan, was submitted in Sept. 1964, to be effective Aug. 1964, and is still being held pending approval.
Kentucky..... June 1962	Revised state plan pages including these provisions were approved for incorporation in 1964 and 1965.
Louisiana..... Jan. 1, 1961	Revisions submitted in 1962 and 1964 are still being held pending approval.
Michigan..... July 1955	Revisions dated Apr. 2, 1963, were approved June 4, 1963.

State and effective date of approved state policy.		*Status of subsequent revisions submitted for approval and incorporation in the State's plan.*
Mississippi.....	Feb. 1954	Revisions submitted in 1966 and subsequently are being held pending approval.
Missouri.....	Oct. 1951	
New Hampshire.....	1948	
New Mexico....	April 1964	A revised state plan page including this provision was approved for incorporation June 16, 1967.
North Carolina..	Sept. 1955	
Oklahoma.....	May 1963	A revised state plan page including this provision was approved for incorporation Mar. 1964 and a correction of a clerical error which would have changed the sense of the provision was made and accepted Feb. 1967.
South Carolina..	Oct. 1956	
Tennessee.....	June 1955	Three revisions, beginning in 1964, are being held pending approval.
Texas.....	Nov. 1959	
Virginia.....	July 1956	A revision dated July 1962 is still being held pending approval.

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY *v.* STATE TAX COMMISSION.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 755. Argued April 22, 1968.—Decided June 17, 1968.

Massachusetts sales tax (which by its terms must be passed on to the purchaser) and use tax are invalid as applied to national banks since such taxes are not among the only four specified methods of taxation in addition to taxes on real estate by which, under 12 U. S. C. § 548, Congress has permitted States to tax national banks. Pp. 339–348.

— Mass. —, 229 N. E. 2d 245, reversed.

Ronald H. Kessel argued the cause for appellant. With him on the brief were *John P. Weitzel* and *Alex J. McFarland.*

Alan J. Dimond, Assistant Attorney General of Massachusetts, argued the cause for appellee. With him on the brief were *Elliot L. Richardson,* Attorney General, *Walter H. Mayo III,* Assistant Attorney General, and *Mark L. Cohen,* Deputy Assistant Attorney General.

Briefs of *amici curiae* were filed by *James Lawrence White* for the Colorado Bankers Assn.; by *William C. Sennett,* Attorney General, *John J. Gain,* Assistant Attorney General, and *Edward T. Baker* and *George W. Keitel,* Deputy Attorneys General, for the Commonwealth of Pennsylvania; by *Louis J. Lefkowitz,* Attorney General, *Ruth Kessler Toch,* Solicitor General, and *Robert W. Bush,* Assistant Attorney General, for the State of New York, and by *James F. Bell* and *Brian C. Elmer* for the National Association of Supervisors of State Banks.

MR. JUSTICE BLACK delivered the opinion of the Court.

The principal issue raised by this case concerns the extent to which States may tax a national bank. The

Supreme Judicial Court for the Commonwealth of Massachusetts held that appellant, First Agricultural National Bank of Berkshire County, was subject to Massachusetts' recently enacted sales and use taxes [1] on purchases for its own use of tangible personal property. For reasons to be stated we believe this decision was erroneous, and we reverse.

As long ago as 1819, in the historic case of *M'Culloch* v. *Maryland,* 4 Wheat. 316, this Court declared unconstitutional a state tax on the bank of the United States since, according to Chief Justice Marshall, this amounted to a "tax on the operation of an instrument employed by the government of the Union to carry its powers into execution." 4 Wheat., at 436–437. A long line of subsequent decisions by this Court has firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national, banks. *Owensboro Nat. Bank* v. *Owensboro,* 173 U. S. 664, 668; *Des Moines Nat. Bank* v. *Fairweather,* 263 U. S. 103, 106; *First Nat. Bank* v. *Hartford,* 273 U. S. 548, 550; *Iowa-Des Moines Nat. Bank* v. *Bennett,* 284 U. S. 239, 244. As recently as 1966, MR. JUSTICE FORTAS, speaking for a unanimous Court, thought this ancient principle so well established that he used national banks as an example in holding the American Red Cross immune from state taxation:

> "In those respects in which the Red Cross differs from the usual government agency—*e. g.*, in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—*e. g., national banks*—whose status as tax-immune instrumentalities of the United States is

[1] Acts and Resolves, 1966, c. 14, §§ 1 and 2.

beyond dispute." Department of Employment v. *United States,* 385 U. S. 355, 360. (Emphasis added.)

The decision below recognized the strong precedents against taxation, but the Massachusetts Supreme Judicial Court was of the opinion that the status of national banks has been so changed by the establishment of the Federal Reserve System [2] that they should no longer be considered nontaxable by the States as instrumentalities of the United States. Essentially the reasoning of the Supreme Judicial Court is that under present-day conditions and regulations there is no substantial difference between national banks and state banks; and the implication of this is, of course, that national banks lack any unique quality giving them the character of a federal instrumentality. Because of pertinent congressional legislation in the banking field, we find it unnecessary to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities.

As will be seen, Congress has been far from reluctant to pass legislation in the banking field. There are important committees on banking and currency in both Houses which continually monitor banking affairs and propose new legislation when changes are felt to be needed. For purposes of this case, the most important piece of banking legislation is 12 U. S. C. § 548 [3] which

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[2] The Federal Reserve Act of December 23, 1913, c. 6, 38 Stat. 251, 12 U. S. C. § 221 *et seq.*

[3] This section provides in pertinent part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or

originated as part of the Act of June 3, 1864, c. 106, § 41, 13 Stat. 111. This section allows state taxation of national banks in any one of four specified ways in addition to taxes on their real estate. Before this legislation was originally enacted in 1864, there was sharp controversy in the Congress over the extent to which the States should be allowed to tax national banks. A vocal opponent to *any* state taxation of national banks was the powerful Senator Sumner of Massachusetts, who said:

> "If you allow the State to interfere with the proposed system [of national banks] in any way, may they not embarrass it? Where shall they stop? Where will you run a line?
>
> . . . . .
>
> "Now, sir, every consideration, every argument which goes to sustain this great judgment [*M'Culloch* v. *Maryland*] may be employed against the proposed concession to the States of the power to tax this national institution in any particular, whether directly or indirectly." Cong. Globe, 38th Cong., 1st Sess., 1893–1894 (1864).

On the other side, proposed amendments expressly permitting much broader state and local taxation of national banks were introduced, debated, and rejected by the Congress. Among these was an amendment introduced in the House which would have made national banks

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holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income . . . .

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others . . . .

. . . . .

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

subject, without exception, to all state and local general taxes on personal as well as real property:

> "And the said associations or corporations shall severally be subject to State and municipal taxation upon their real and personal estate, the same as persons residing at their respective places of business are subject to such taxation by State laws." Cong. Globe, 38th Cong., 1st Sess., 1392 (1864).

The result of this conflict was that the legislation, when finally passed, was a compromise which permitted state taxation of national banks in certain ways, but prohibited all other forms of state taxation. Senator Fessenden, Chairman of the Finance Committee, clearly defined the compromise that was being enacted:

> "If the Senator reads this bill he will perceive that all the power of taxation upon the operations of the bank itself, all upon the circulation, all upon the deposits, all upon everything which can properly be made by a tax is reserved to the General Government; that the States cannot touch it in any possible form; that they are limited and controlled; the simple right is given them to say that the property which their own citizens have invested in it shall contribute to State taxation precisely as other property." Cong. Globe, 38th Cong., 1st Sess., 1895 (1864).

It seems clear to us from the legislative history that 12 U. S. C. § 548 was intended to prescribe the only ways in which the States can tax national banks. And this is certainly not a novel interpretation of the section, as shown by previous decisions of this Court. As early as 1899 the Court declared:

> "This section [R. S. § 5219, 12 U. S. C. § 548], then, of the Revised Statutes is the measure of the power of a State to tax national banks, their prop-

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> erty or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void." *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 664, 669.

A more complete explanation of § 548 and its meaning appears in this Court's opinion in *Bank of California* v. *Richardson*, 248 U. S. 476, where it was said:

> "There is also no doubt from the section [R. S. § 5219, 12 U. S. C. § 548] that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in the section. . . .
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> "Two provisions in apparent conflict were adopted. First, the absolute exclusion of power in the States to tax the banks, the national agencies created, so as to prevent all interference with their operations, the integrity of their assets, or the administrative governmental control over their affairs. Second, preservation of the taxing power of the several States so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation . . . .
>
> "The first aim was attained by the non-recognition of any power whatever in the States to tax the federal agencies, the banks, except as to real estate specially provided for, and, therefore, the exclusion of all such powers. The second was reached by a recognition of the fact that, considered from the point of view of ultimate and beneficial interest,

> every available asset possessed or enjoyed by the banks would be owned by their stockholders and would be, therefore, reached by taxation of the stockholders as such. . . ." 248 U. S., at 483.

Finally, so there can be no doubt, consider these words of the Court in *Des Moines Bank* v. *Fairweather,* 263 U. S. 103:

> "This section [R. S. § 5219, 12 U. S. C. § 548] shows, and the decisions under it hold, that what Congress intended was that national banks and their property should be free from taxation under state authority, other than taxes on their real property and on shares held by them in other national banks; and that all shares in such banks should be taxable to their owners, the stockholders, much as other personal property is taxable . . . ." 263 U. S., at 107.

Thus, at least since the *Owensboro* decision, *supra,* in 1899, it has been abundantly clear that 12 U. S. C. § 548 marks the outer limit within which States can tax national banks. Now this Court is asked to change what legislative history and prior decisions have established is the precise meaning of an Act of Congress. This we cannot do. For, as we pointed out above, the banking field has traditionally been an area of particular congressional concern marked by legislation responsive to new problems. This can be illustrated by the history of § 548 alone. It was originally passed in 1864 because the 1863 Currency Act [4] contained no provision for state taxation of national banks or their shares. In 1868 a technical amendment was made to the section.[5] Then in 1923 a substantive amendment was made which, among other things, authorized the state taxation of national

[4] Act of February 25, 1863, c. 58, 12 Stat. 665.

[5] Act of February 10, 1868, c. 7, 15 Stat. 34.

bank income and dividends.[6] Another important part of this amendment was the declaration that "bonds, notes, or other evidences of indebtedness" in the hands of individual citizens were not to be considered "moneyed capital . . . coming into competition with the business of national banks." Just two years before, this Court had ruled in *Merchants' Nat. Bank of Richmond* v. *Richmond*, 256 U. S. 635 (1921), that such bonds and notes *were* moneyed capital in competition with national banks and thus covered by § 548. Senator Pepper, who spoke for the amendment, made clear that it was offered as a response to this Court's decision which had placed an erroneous interpretation on the section.[7] Then again in 1926, § 548 was amended to permit States to levy franchise and excise taxes on national banks measured by the entire income (including income from tax-exempt securities) of the banks.[8] Finally, in 1950, a bill was sent to the Senate Committee on Banking and Currency which expressly permitted the levying of state sales and use taxes on national banks, but Congress did not pass it.[9]

Because of § 548 and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from the Congress, which has established the present limits.

With this primary question out of the way, there is one additional issue which must be resolved. The court below held, contrary to appellant's contention, that the Massachusetts sales tax is not imposed upon the bank as a purchaser, but is a tax upon vendors who sell tangible personal property to the bank. Of course if

[6] Act of March 4, 1923, c. 267, 42 Stat. 1499.

[7] 64 Cong. Rec. 1454 (1923).

[8] Act of March 25, 1926, c. 88, 44 Stat. 223.

[9] See Hearing on S. 2547 before the Subcommittee on Federal Reserve Matters of the Senate Committee on Banking and Currency, 81st Cong., 2d Sess., 9 (1950).

this is true, the bank cannot object if a particular vendor decides to pass the burden of the tax on to it through an increased price. But if this is not true, and if the tax is on the bank as a purchaser, then, because it is a national bank, appellant is exempt under 12 U. S. C. § 548. Because the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax. See *Society for Savings* v. *Bowers*, 349 U. S. 143, 151, and the cases cited therein. And essentially the question for us is: On whom does the incidence of the tax fall? See *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 121–122. Also see *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232.

It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 99. Subsection 3 of the Massachusetts sales tax provides:

> "Reimbursement for the tax hereby imposed *shall be paid by the purchaser* to the vendor and each vendor in this commonwealth *shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section,* or an amount equal as nearly as possible or practicable to the average equivalent thereof; *and such tax shall be a debt from the purchaser to the vendor,* when so added to the sales price, and shall be recoverable at law in the same manner as other debts." Acts and Resolves, 1966, c. 14, § 1, subsec. 3. (Emphasis added.)

This subsection reads to us as a clear requirement that the sales tax be passed on to the purchaser. And this interpretation is reinforced by subsection 23 which pro-

hibits as unlawful advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make. We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true), this means the tax is on the vendor. There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling. And it seems clear to us that the force of the law, especially the language in subsection 3, is such that, regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written.

For these reasons we reverse and hold that appellant is immune from both the Massachusetts use and sales taxes.

Reversed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I would make clear that the Constitution of its own force does not prohibit Massachusetts from applying its uniform sales and use taxes to, among other things, appellant's wastebaskets.[1] It seems to me necessary to

[1] The *reductio ad absurdum* in the text is, unlike most, somewhat accurate. One item upon which, appellant informed its supplier, it should not have to pay the sales tax was a wastebasket (as well as, *e. g.*, "1 Box 5 x 7 Index Cards"). The record does not reveal the extent of appellant's liability for use taxes; appellant paid a total of $575.66 in sales taxes for the three months of the year 1966 that are specifically at issue here.

decide that constitutional question in order properly to interpret 12 U. S. C. § 548, upon which the Court bases its decision. Moreover, the refusal to decide the issue gives further life to a largely outmoded doctrine.

Mr. Justice Brandeis rightly cautioned that "[i]n cases involving constitutional issues . . . this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may . . . 'depend altogether on the force of the reasoning by which it is supported.'" [2] I think that in light of the present functions and role of national banks they should not in this day and age be considered constitutionally immune from nondiscriminatory state taxation, and that § 548 should not be construed as giving them a statutory immunity from the taxes here involved.

I.

A. The starting point of the constitutional inquiry is, of course, *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819). That case involved a state statute applicable to any bank established in Maryland "without authority from the State," *i. e.,* the Second Bank of the United States, chartered by Congress in 1816. It prohibited the circulation of notes (currency) by such a bank except on payment of a 2% stamp tax, or, alternatively, upon the payment annually to the State of $15,000. Substantial monetary penalties were provided for violations of the statute, for which the State had sued cashier M'Culloch. In a celebrated opinion Chief Justice Marshall, a principal architect of our federalism, struck down the Maryland statute.

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[2] *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 412–413 (1932) (dissenting opinion), quoting from *Passenger Cases,* 7 How. 283, 470 (1849) (Taney, C. J.).

In *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824), *M'Culloch* was applied to strike down an Ohio statute that attempted to extract an annual tax of $50,000 from each branch of a business operating in the State without its authority. The statutes found unconstitutional in both of those cases were patently discriminatory against the Second Bank of the United States (the Ohio statute specifically mentioned it), for the taxes did not apply to state-chartered banks. Chief Justice Marshall, however, did not limit his opinions in the two cases to discriminatory taxation, and they were applied by the Court in *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 664 (1899), with little independent analysis to hold that Kentucky could not collect a nondiscriminatory franchise tax from a national bank. There was no discussion of the possible differences between federal functions performed by the kind of national bank involved there, which existed by virtue of legislation enacted in 1863 and 1864, and the quite distinct functions performed by the Second Bank of the United States involved in *M'Culloch* and *Osborn*.

Virtually all of the later cases in which national banks have been held to be federal instrumentalities immune from state taxation depend upon these three cases. One could, and perhaps should, read *M'Culloch* and *Osborn* simply for the principle that the Constitution prohibits a State from taxing discriminatorily a federally established instrumentality. On that view, Chief Justice Marshall's statement that "the power to tax involves the power to destroy," *M'Culloch* v. *Maryland*, *supra*, at 431, did not relate to a principle entirely necessary to the decision. As Mr. Justice Frankfurter pointed out in reference to what he called that "seductive *cliché*":

> "The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr.

> Justice Holmes's pen: 'The power to tax is not the power to destroy while this Court sits.' " [3]

Absent an examination of the differences between the bank involved in *Owensboro* and the Second Bank of the United States involved in *M'Culloch* and *Osborn*, the *Owensboro* decision might be justified upon either of the following grounds: its alternative holding that the statute that is now § 548 constituted congressional delineation of the permissible scope of the power of the State to tax a national bank, or perhaps that the particular franchise tax was invalid as applied because it was based upon a valuation that included the national bank's required investment in nontaxable bonds of the United States.[4] Or one might view *Owensboro*, in holding a nondiscriminatory tax invalid, as simply incorrect.

Such a limited view of those hoary cases would, of course, require a re-evaluation of the validity of the doctrine of intergovernmental tax immunities—a doctrine which does not rest upon any specific provisions of the

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[3] *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 489, 490 (1939) (concurring opinion), quoting from *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223 (1928) (dissenting opinion).

[4] *Owensboro* might also be viewed simply as prohibiting a franchise tax, *i. e.*, as holding that a State may not condition the privilege to operate within its borders granted to the bank by Congress, by exacting that kind of tax. (Such a tax is permissible under 12 U. S. C. § 548, as amended after *Owensboro*, see *Tradesmens Nat. Bank* v. *Tax Comm'n*, 309 U. S. 560 (1940).) The taxes in *M'Culloch* and *Osborn*, apart from their discriminatory aspects, might be similarly viewed: the Maryland tax was directly upon the bank's operations, and alternatively upon its privilege to operate within the State; the Ohio tax in *Osborn* was also a condition upon the bank's privilege to transact business there. While the language and holdings of later cases go well beyond that limited view, that view would seem preferable to me to interpreting those constitutional decisions as flatly prohibiting all forms of state taxation, aside from exceptions listed in *M'Culloch*, 4 Wheat., at 436 (see *infra*, at 361).

Constitution, but rather upon this Court's concepts of federalism. See *M'Culloch* v. *Maryland, supra,* at 426; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 487–492 (1939) (Frankfurter, J., concurring); T. Powell, Vagaries and Varieties in Constitutional Interpretation, c. IV (1956). I have no doubt that Congress could provide (and has provided, see *infra,* at 362) statutory immunity from state taxation for the federal instrumentalities it may establish. See, *e. g., United States* v. *City of Detroit,* 355 U. S. 466, 474 (1958); *Maricopa County* v. *Valley Nat. Bank,* 318 U. S. 357, 361 (1943); *Railroad Co.* v. *Peniston,* 18 Wall. 5, 37–38 (1873) (concurring in judgment). Given that congressional power, there is little reason for this Court to cling to the view that the Constitution itself makes federal instrumentalities immune from state taxation in the absence of authorizing legislation. The disparate kinds of instrumentalities and forms of state taxation create difficulties for *ad hoc* resolution of the immunity issue by this Court based only upon abstract concepts of federalism. See generally Powell, Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633 (1945); Powell, Remnant of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 757 (1945). As the Court has sometimes realized:

> "Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve." *United States* v. *City of Detroit,* 355 U. S., at 474.

B. The Court has never indicated any great desire to reconsider *in toto* the doctrine of the constitutional immunity of federal instrumentalities from state taxation. The Court has, however, noted the trend in its decisions toward restricting "the scope of immunity [from taxes] of private persons seeking to clothe themselves with gov-

ernmental character," *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 352 (1949). The wisdom of that trend counsels, I think, a rejection of the constitutional argument in this case.

As the Court said last Term, "there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality," *Department of Employment* v. *United States*, 385 U. S. 355, 358–359 (1966) (holding Red Cross immune). Various formulations of the controlling test have been used to determine whether institutions or individuals are immune: whether they "have been so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity," *United States* v. *Boyd*, 378 U. S. 39, 48 (1964); whether they "are arms of the Government deemed by it essential for the performance of governmental functions," and "are integral parts of [a government department and] . . . share in fulfilling the duties entrusted to it," *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 485 (1942) (Army post-exchanges immune); whether they have been so "assimilated by the Government as to become one of its constituent parts," *United States* v. *Township of Muskegon*, 355 U. S. 484, 486 (1958); and whether the institution is regarded "virtually as an arm of the Government," *Department of Employment* v. *United States*, *supra*, at 359–360.

Under those general rubrics, the Court has looked to various specific factors and characteristics to determine the status of the specific institution: whether it is organized for private profit, and whether the Government has retained such control over it so that "it could properly be called a 'servant' of the United States in agency terms," *United States* v. *Township of Muskegon*, *supra*, at 486; whether it was organized to effectuate a spe-

cific governmental program, *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102 (1941); whether its ownership, substantially or totally, lies in the Government, *Clallam County* v. *United States*, 263 U. S. 341, 343 (1923); *Railroad Co.* v. *Peniston*, 18 Wall., at 32; whether government officials handle and control its operations, *Standard Oil Co.* v. *Johnson, supra;* whether its officers or any significant portion of them are appointed by the Government, *Department of Employment* v. *United States, supra;* compare *Railroad Co.* v. *Peniston, supra;* whether the Government gives it significant financial aid, whether it is charged by law with carrying out some of the Government's international commitments, and whether it performs "functions indispensable to the workings" of a governmental unit, *Department of Employment* v. *United States, supra*, at 359.

Under any of those rubrics and applying the factors listed above—a list not intended to be exhaustive—a national bank cannot be considered a tax-immune federal instrumentality. It is a privately owned corporation existing for the private profit of its shareholders. It performs no significant federal governmental function that is not performed equally by state-chartered banks. Government officials do not run its day-to-day operations nor does the Government have any ownership interest in a national bank.

Appellant points to two factors as leading to the conclusion that national banks are federal instrumentalities: that they "owe their very existence to congressional legislation," and that they are subject to extensive federal regulation. But the fact that institutions "owe their existence to," *i. e.*, are chartered by, the Government, has been definitely rejected as a basis alone for determining they should be tax immune. *Railroad Co.* v. *Peniston, supra;* cf. *Broad River Power Co.* v. *Query*, 288 U. S. 178 (1933). Similarly, a whole host of businesses and

institutions are subject to extensive federal regulation and that has never been thought to bring them within the scope of the "federal instrumentalities" doctrine. The plain fact is that one could hold that national banks have a constitutional tax-immune status today only by mechanically applying the three seminal cases of *M'Culloch, Osborn,* and *Owensboro.* It is instructive, therefore, to examine the functions performed by the national banks involved in those cases.

The Second Bank of the United States, involved in *M'Culloch* and *Osborn,* would clearly be a federal instrumentality under the Court's most recent discussion of the doctrine (*Department of Employment, supra*): the United States owned 20% of its capital stock (the remainder being owned by private persons); the President appointed five of its 25 directors, and the Government, as a shareholder, participated in the election of the others; the Secretary of the Treasury was required to deposit all of the public funds in the bank, unless he could give reasons to Congress why he should not do so; the bank was required to transmit funds for the United States without charge; the bank issued currency which was established as legal tender for all debts owing to the Government; and the bank clearly acted as the fiscal agent of the Government, handling its foreign exchange transactions. See P. Studenski & H. Krooss, Financial History of the United States 83–88, 103–106 (2d ed. 1963); Federal Reserve System, Banking Studies 7–8, 18, 39–41 (1941).

Even the national bank involved in *Owensboro* might warrant tax-immune status were it in existence today. It was established pursuant to the National Currency Acts of 1863 and 1864 [5] which were enacted largely to

[5] Act of February 25, 1863, 12 Stat. 665 ("An Act to provide a national Currency . . ."); Act of June 3, 1864, 13 Stat. 99 ("An Act to provide a National Currency . . .").

bolster the Union's financial status, shaky because of the Civil War. Banking Studies, *supra*, at 43–46. Most importantly, from the standpoint of analyzing the federal functions such banks served, national banks under the Civil War legislation,[6] to which national banks today trace their history, had important and significant functions concerning currency. They were authorized to issue currency, printed for them by the Treasury Department, and such currency was established as legal tender for all debts owing to, or payable by, the Government. To insure the stability of the national currency by insuring the stability of the issuing banks, as well as to provide a ready market for the Government, each such national bank was required to secure its currency by depositing United States bonds with the Treasury Department. Banking Studies, *supra*, 14–16, 41–46; Studenski & Krooss, *supra*, 154–155.

All of this was radically changed with the passage of the Federal Reserve Act of 1913, 38 Stat. 251, as amended, 12 U. S. C. § 221 *et seq.*, and by subsequent developments with respect both to the Federal Reserve System and to national banks. To capsulize those developments greatly, suffice it to say that the Federal Reserve banks (and System) are now the monetary and fiscal agents of the United States. 12 U. S. C. § 391. By 1935, the power of national banks to issue currency had ceased and now Federal Reserve banks are the only banking institutions that can do so. Banking Studies, *supra*, at 240; Federal Reserve System, The Federal Reserve System: Purposes and Functions c. X (5th rev. ed. 1967). The diminished importance of national banks as federal functionaries was compensated for by the enactment of legislation designed to make them more competitive with state banks, *e. g.*,

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[6] See n. 5, *supra;* see also revenue acts, Act of March 3, 1865, §§ 6, 7, 13 Stat. 484; Act of July 13, 1866, § 9, 14 Stat. 146.

branch banking, 44 Stat. 1228 (1927), as amended, 12 U. S. C. § 36 (c); fiduciary powers, 76 Stat. 668 (1962), 12 U. S. C. § 92a; rate of interest on loans, 48 Stat. 191 (1933), as amended, 12 U. S. C. § 85; capitalization, 48 Stat. 185 (1933), 12 U. S. C. § 51; and interest on time and savings deposits, 44 Stat. 1232 (1927), 12 U. S. C. § 371.

To be sure, the Federal Reserve System could not function without national banks, which are required to be members therein, 12 U. S. C. § 222, and in that sense they are part and parcel of the establishment and effectuation of the national fiscal and monetary policies. But, in my view, that does not make them sufficiently quasi-public to enjoy the tax-immune status of federal instrumentalities. If that alone were enough, then it would seem that state banks which elect to join the Federal Reserve System should also be tax-immune federal instrumentalities.[7]

In any event, there is little difference today between a national bank and its state-chartered competitor: the ownership, control and capital source of each is private; each exists for private profit. More importantly, neither may issue legal tender:

> "With the passing of the national bank notes, the United States lost much of the difference between the national banking system and the state banking systems. Except for automatic membership in the Federal Reserve System, different examining boards, and more or less different standards of examination, appraisal, and the like, the main point of differentiation between the national banking system and any [state] . . . banking system . . . was formerly the

[7] As of December 31, 1966, membership in the Federal Reserve System was composed of 1,351 state-chartered, and 4,799 national, banks. The Federal Reserve System: Purposes and Functions, *supra*, at 24–25.

privilege of currency issue." J. Paris, Monetary Policies of the United States, 1932–1938, at 96 (1938).

Today the national banks perform no significant fiscal services to the Federal Government not performed by their state competitors. Any federally insured bank, state or national, may be a government depository. 12 U. S. C. § 265. The principal checking accounts of the Government are carried today, not by national banks, but by the Federal Reserve banks. When a new issue of government securities is offered, the Federal Reserve banks receive the applications of purchasers. When government securities are to be redeemed or exchanged, the transactions are handled by the Federal Reserve banks. Those banks administer for the Treasury the tax and loan deposit accounts of the banks in their respective districts. See The Federal Reserve System: Purposes and Functions, *supra*, at 225–234, 274–277; Banking Studies, *supra*, 260–265.

In *Graves* v. *New York ex rel. O'Keefe*, 306 U. S., at 483, Mr. Justice Stone wrote for the Court:

> "[T]he implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed." [8]

That is precisely the situation here; I would heed those words and hold that national banks, today, are not

[8] Accord, *Indian Motorcycle Co.* v. *United States*, 283 U. S. 570, 580 (1931) (Stone, J., dissenting).

immune from nondiscriminatory state taxation as federal instrumentalities.[9] I might also add that I am a bit mystified that under the Court's decisions in this field the Federal Government in practical effect must pay a state tax in dealing with its contractors (who pass the tax on to the Government), see, *e. g., Alabama* v. *King & Boozer,* 314 U. S. 1 (1941), but that a national bank, a private profit-making corporation, is constitutionally immune from state taxation.

II.

The Court holds that 12 U. S. C. § 548, *ante,* at 341, n. 3, "was intended to prescribe the only ways in which the States can tax national banks." *Ante,* at 343. I would be less than candid not to acknowledge that that holding has the virtue of being supported by substantial precedent. But that seems to me to be its only virtue. That interpretation of § 548 has its judicial origin in the *Owensboro* case. Given the constitutional premise of *Owensboro,* that interpretation would be quite clearly correct. But since I reject the constitutional premise so far as national banks today are concerned, it seems to me § 548 ought to be examined freshly, for the "immunity formerly said to rest on constitutional implication [should not] . . . now be resurrected in the form of statutory implication." *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, 604 (1943).

Section 548 expressly mentions four specified types of taxes: those on national bank shares, on dividends on shares in the hands of stockholders, on the income of the

[9] Compare the rejection of a national bank's contention that it, as a federal instrumentality, should be exempt from the federal labor laws, *NLRB* v. *Bank of America,* 130 F. 2d 624, 627 (C. A. 9th Cir. 1942) (footnote omitted):

"It is a privately owned corporation, privately managed and operated in the interest of its stockholders. . . . The United States did not create it, but has merely enabled it to be created. . . ."

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bank, and taxes "according to or measured by" a bank's income. It provides that the imposition of any one of the four listed taxes "shall be in lieu of the others." That statement, together with language of the section omitted in the Court's note as not pertinent (*ante*, at 341–342, n. 3),[10] makes clear that the purpose of the section was to

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[10] The relevant omitted portions of § 548 read:

"1. (a) . . .

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

"(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however*, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or

insure the competitive equality of the banks with other businesses by preventing the bank or its shareholders from being subjected to more than one of the four enumerated types of taxes, other than real property taxes, so as to prevent multiple taxation of the same income, unless the States taxed the income of other businesses in similar multiple fashion. See 12 U. S. C. § 548, subsections 1 (b), (c), and (d), *supra,* n. 10. All that the majority can point to in the legislative history of § 548 is that the Congress was well aware of *M'Culloch* v. *Maryland.* And that decision specifically stated the following:

> "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State." (4 Wheat., at 436.)

I view § 548 as congressional delineation of those areas of state taxation of national banks permitted by the *M'Culloch* decision itself. I would hold that the section was "merely designed to insure that the inherent taxing powers which were recognized in" that case—"e. g., the power to tax the real property of the banks as well as the privately owned shares—be exercised in a nondiscriminatory fashion." *Liberty Nat. Bank* v. *Buscaglia,* 21 N. Y. 2d 357, 370, 235 N. E. 2d 101, 108 (1967). As this Court said in *Tradesmens Nat. Bank* v. *Oklahoma Tax Comm'n,* 309 U. S. 560, 567 (1940), "the various restrictions [§ 548] . . . places on the permitted meth-

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by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders."

ods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class."

Moreover, whatever else may be said of the statute, it most assuredly does not provide specifically that it is the sole measure of the State's power of taxation. One could argue that, given the state of constitutional law as it then existed, Congress saw no need to say specifically in § 548 that national banks were immune from state taxation except as that section permitted. Aside from the misreading of *M'Culloch* that such a view entails, the constitutional immunity of federal instrumentalities was just as plain when Congress provided statutory immunity for such agencies as, *e. g.*, the Federal Reserve banks, 38 Stat. 258 (1913), 12 U. S. C. § 531; Federal land banks, 39 Stat. 380 (1916), 12 U. S. C. § 931; many other federal banking institutions; [11] the Reconstruction Finance Corporation, 47 Stat. 9 (1932), 15 U. S. C. § 607; and the Public Housing Administration, 50 Stat. 890 (1937), 42 U. S. C. § 1405 (e), and a host of government-owned corporations.[12]

It is not without relevance in construing § 548, it seems to me, that the kinds of state taxes here involved did not exist at the time the section was adopted and were not a significant factor in the raising of state revenue until the early 1930's, subsequent to the last amendment of § 548 in 1926. See generally H. R. Rep. No. 565, 89th Cong., 1st Sess., 608 (1965). I think we should be reluctant to interpret a statute having such narrow

[11] *E. g.*, federal intermediate credit banks, 12 U. S. C. § 1111; Federal Home Loan Bank, 12 U. S. C. § 1433; federal savings and loan associations, 12 U. S. C. § 1464 (h).

[12] *E. g.*, Federal Deposit Insurance Corp., 12 U. S. C. § 1825. See Government Corporation Control Act of 1945, 59 Stat. 597, as amended, 31 U. S. C. § 841 *et seq.*

scope as § 548 as encompassing such a broad prohibitory application. It seems to me that we would do far better to recognize that the Constitution does not prohibit nondiscriminatory state taxation of national banks, and that § 548 limits only the kinds of taxes specifically set forth therein. Only in that way is Congress free to re-evaluate the situation. That is, so far as construing § 548 is concerned, in practical effect the issue is who shall bear the burden of seeking congressional action. I would put the burden where it ought to be, namely, on the private profit-making corporation that seeks exemption from nondiscriminatory state taxation.

Finally, a major national banking policy has been to foster competitive equality of national and state banks. See, *e. g., First Nat. Bank* v. *Walker Bank,* 385 U. S. 252 (1966); *Lewis* v. *Fidelity & Deposit Co.,* 292 U. S. 559 (1934). We ought, if other considerations are not decisive, to promote rather than retard that strong policy.

For the reasons stated, I would affirm.

MR. JUSTICE HARLAN: In addition to the reasons given in my Brother MARSHALL's opinion, which I have joined, I would affirm the judgment below on the basis of that part of Justice Reardon's opinion for the Supreme Judicial Court of Massachusetts which upheld the application of Massachusetts' use tax to national banks. See —— Mass. ——, ——–——, 229 N. E. 2d 245, 251–260.

MANCUSI, WARDEN *v.* DeFORTE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 844. Argued April 25, 1968.—Decided June 17, 1968.

The Nassau County District Attorney issued a subpoena *duces tecum* to the Union of which respondent was an officer calling for the production of certain books and records. The Union refused to comply and the state officials without a warrant seized union records from an office shared by respondent and several other union officials, despite the protests of respondent who was present in the office and had custody of the papers at the time of seizure. The seized materials were admitted at his trial for conspiracy, coercion, and extortion, and he was convicted. The federal District Court denied a writ of habeas corpus, but the Court of Appeals reversed and directed that the writ issue on the ground that respondent's Fourth and Fourteenth Amendment rights were violated by the search and seizure and that the materials were inadmissible under *Mapp* v. *Ohio*, 367 U. S. 643. Respondent argues for affirmance on this ground alone. *Held:*

1. One has standing to object to a search of his office, as well as of his home, and respondent was entitled to expect that records in his custody at his office in union headquarters would not be taken without his permission or that of his union superiors, whether he occupied a "private" office or shared one with other union officials. Respondent thus had standing to object to the admission of the seized papers at his trial. *Jones* v. *United States*, 362 U. S. 257. Pp. 367–370.

2. The warrantless search of respondent's office was unreasonable under the Fourth and Fourteenth Amendments as the subpoena *duces tecum*, issued by the District Attorney himself, does not qualify as a valid search warrant, and this search comes within no exception to the rule requiring a warrant. Pp. 370–372.

379 F. 2d 897, affirmed.

Michael H. Rauch, Assistant Attorney General of New York, argued the cause for petitioner. With him on the brief were *Louis J. Lefkowitz*, Attorney General, and *Samuel A. Hirshowitz*, First Assistant Attorney General.

James L. Lekin argued the cause and filed a brief for respondent.

MR. JUSTICE HARLAN delivered the opinion of the Court.

In 1959 the respondent, Frank DeForte, a vice president of Teamsters Union Local 266, was indicted in Nassau County, New York, on charges of conspiracy, coercion, and extortion, it being alleged that he had misused his union office to "organize" owners of juke boxes and compel them to pay tribute. Prior to the return of the indictment, the Nassau County District Attorney's office issued a subpoena *duces tecum* to Local 266, calling upon it to produce certain books and records. The subpoena was served upon the Union at its offices. When the Union refused to comply, the state officials who had served the subpoena conducted a search and seized union records from an office shared by DeForte and several other union officials. The search and seizure were without a warrant and took place despite the protests of DeForte, who was present in the office at the time. Over DeForte's objection, the seized material was admitted against him at trial. He was convicted.

On direct appeal to the New York courts,[1] DeForte unsuccessfully argued, *inter alia*, that the seized material was constitutionally inadmissible in state proceedings under the rule laid down in *Mapp* v. *Ohio*, 367 U. S. 643, because the search and seizure occurred without a warrant.[2] DeForte subsequently brought a federal habeas

[1] Those appeals culminated in a petition for certiorari to this Court, which was denied *sub nom. De Grandis* v. *New York*, 375 U. S. 868.

[2] DeForte's petition for certiorari following direct appeal was denied in 1963, more than two years after the Court's decision in *Mapp* v. *Ohio*. Under the rule laid down in *Linkletter* v. *Walker*, 381 U. S. 618, DeForte is entitled to invoke the exclusionary principle established in *Mapp*. See 381 U. S., at 622 and n. 5.

corpus proceeding, in which he made the same contention. The United States District Court for the Western District of New York denied the writ, 261 F. Supp. 579, but on appeal the Court of Appeals for the Second Circuit reversed and directed that the writ issue. 379 F. 2d 897. We granted certiorari, 390 U. S. 903, to consider the State's [3] contention that the Court of Appeals erred in upsetting this state conviction. Concluding that the Court of Appeals was right, we affirm.

I.

It is desirable at the outset to make clear what is and what is not involved in this case. The decision below was based solely upon a finding that DeForte's Fourth and Fourteenth Amendment rights, see *Ker* v. *California*, 374 U. S. 23, 30–34, were violated by the search and seizure, and that the seized material was therefore inadmissible under *Mapp*. It is on this ground alone that DeForte argues for affirmance. Consequently, there is no occasion to consider whether DeForte might successfully have asserted his Fifth Amendment right against self-incrimination with respect to the use against him of the seized records. Cf. *United States* v. *White*, 322 U. S. 694; *Wilson* v. *United States*, 221 U. S. 361. Nor is there any need to inquire whether DeForte could have asserted a Fourth or Fifth Amendment claim on behalf of the Union, for he did not do so. Moreover, this is not a case in which it is necessary to decide whether the traditional doctrine that Fourth Amendment rights "are personal rights, and . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure," *Simmons* v. *United States*, 390 U. S. 377, at 389, should be modified. Cf. *id.*, at 390, n. 12. For DeForte claims

[3] The petitioner, Mancusi, is the warden of the New York State prison in which DeForte is confined.

that under the traditional rule he does have standing to challenge the admission against him at trial of union records seized from the office where he worked. The questions for decision, then, are whether DeForte has Fourth Amendment standing to object to the seizure of the records and, if so, whether the search was one prohibited by the Fourth Amendment.

II.

We deal, first, with the question of "standing." The Fourth Amendment guarantees that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The papers which were seized in this case belonged not to DeForte but to the Union. Hence, DeForte can have personal standing only if, as to him, the search violated the "right of the people to be secure in their . . . houses . . . ." [4] This Court has held that the word "houses," as it appears in the Amendment, is not to be taken literally, and that the protection of the Amendment may extend to commercial premises. See, *e. g., See* v. *Seattle,* 387 U. S. 541; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385.

Furthermore, the Amendment does not shield only those who have title to the searched premises. It was

[4] The fact that the seized papers belonged to the Union does not imply of itself that an individual could never have personal standing to object to their admission against him. For example, state officers conceivably might have seized the papers during a search of DeForte's home, and in that event we think it clear that he would have had standing. *Wilson* v. *United States,* 221 U. S. 361, is by no means to the contrary, for in that case there was no physical search at all. The only Fourth Amendment standing question in *Wilson* was whether a corporate officer had personal standing to object to a subpoena *duces tecum* addressed to the corporation, on the ground that it was overbroad. See 221 U. S., at 375–376.

settled even before our decision in *Jones* v. *United States*, 362 U. S. 257, that one with a possessory interest in the premises might have standing. See, *e. g.*, *United States* v. *Jeffers*, 342 U. S. 48. In *Jones*, even that requirement was loosened, and we held that "anyone legitimately on premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him." 362 U. S., at 267.[5] The Court's recent decision in *Katz* v. *United States*, 389 U. S. 347, also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. See 389 U. S., at 352. The crucial issue, therefore, is whether, in light of all the circumstances, DeForte's office was such a place.

The record reveals that the office where DeForte worked consisted of one large room, which he shared with several other union officials. The record does not show from what part of the office the records were taken, and DeForte does not claim that it was a part reserved for his exclusive personal use. The parties have stipulated that DeForte spent "a considerable amount of time" in

[5] The petitioner contends that this holding was not intended to have general application, but that it was devised solely to solve the particular dilemma presented in *Jones:* that of a defendant who was charged with a possessory offense and consequently might have to concede his guilt in order to establish standing in the usual way. However, this limited reading of *Jones* overlooks the fact that in *Jones* standing was held to exist on two distinct grounds: "(1) [The circumstance that] possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized . . . . (2) *Even were this not a prosecution turning on illicit possession,* the legally requisite interest in the premises was here satisfied . . . ." 362 U. S., at 263. (Emphasis added.) Thus, the second branch of the holding, with which we are here concerned, was explicitly stated to be of general effect.

the office, and that he had custody of the papers at the moment of their seizure.[6]

We hold that in these circumstances DeForte had Fourth Amendment standing to object to the admission of the papers at his trial. It has long been settled that one has standing to object to a search of his office, as well as of his home. See, *e. g., Gouled* v. *United States,* 255 U. S. 298; *United States* v. *Lefkowitz,* 285 U. S. 452; *Goldman* v. *United States,* 316 U. S. 129; cf. *Lopez* v. *United States,* 373 U. S. 427; *Osborn* v. *United States,* 385 U. S. 323. Since the Court in *Jones* v. *United States, supra,* explicitly did away with the requirement that to establish standing one must show legal possession or ownership of the searched premises, see 362 U. S., at 265–267, it seems clear that if DeForte had occupied a "private" office in the union headquarters, and union records had been seized from a desk or a filing cabinet in that office, he would have had standing. Cf. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. In such a "private" office, DeForte would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken except with his permission or that of his union superiors. It seems to us that the situation was not fundamentally changed because DeForte shared an office with other union officers. DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups. This expectation was inevitably defeated by the entrance of state officials, their conduct of a general search, and their removal of records which were in DeForte's custody. It is, of course, irrelevant that the

[6] See Joint Appendix 51–52.

Union or some of its officials might validly have consented to a search of the area where the records were kept, regardless of DeForte's wishes, for it is not claimed that any such consent was given, either expressly or by implication.

Our conclusion that DeForte had standing finds strong support in *Jones* v. *United States, supra.* Jones was the occasional occupant of an apartment to which the owner had given him a key. The police searched the apartment while Jones was present, and seized narcotics which they found in a bird's nest in an awning outside a window. Thus, like DeForte, Jones was not the owner of the searched premises. Like DeForte, Jones had little expectation of absolute privacy, since the owner and those authorized by him were free to enter. There was no indication that the area of the apartment near the bird's nest had been set off for Jones' personal use, so that he might have expected more privacy there than in the rest of the apartment; in this, it was like the part of DeForte's office where the union records were kept. Hence, we think that our decision that Jones had standing clearly points to the result which we reach here.

III.

The remaining question is whether the search of DeForte's office was "unreasonable" within the meaning of the Fourth Amendment. The State does not deny that the search and seizure were without a warrant, and it is settled for purposes of the Amendment that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court,* 387 U. S. 523, 528–529.[7] We

[7] See also *Stoner* v. *California,* 376 U. S. 483; *United States* v. *Jeffers,* 342 U. S. 48; *McDonald* v. *United States,* 335 U. S. 451; *Agnello* v. *United States,* 269 U. S. 20.

think it plain that the state officials' possession of a district attorney's subpoena of the kind involved here [8] does not bring this case within one of those "carefully defined classes." The State has not attempted to justify the search and seizure on that ground, and the New York courts have themselves said as a matter of state law that "[a district attorney's] subpoena duces tecum confers no right to seize the property referred to in the subpoena . . . ." *Amalgamated Union, Local 224* v. *Levine*, 31 Misc. 2d 416, 417, 219 N. Y. S. 2d 851, 853.[9]

Moreover, the subpoena involved here could not in any event qualify as a valid search warrant under the Fourth Amendment, for it was issued by the District Attorney himself,[10] and thus omitted the indispensable condition that "the inferences from the facts which lead to the complaint '. . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U. S. 10, 14." *Giordenello* v. *United States*, 357 U. S. 480, 486. In *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, a corporate office was searched for papers which the corporation had refused to deliver in response to a New York District Attorney's subpoena, apparently similar to the one in this case. Speaking for the Court, Mr. Justice Holmes not only held that the seizure of the papers was unjustified but characterized it as "an outrage." *Id.*, at 391.

[8] A copy of the subpoena appears in the Joint Appendix, at 22. The subpoena was signed by the District Attorney and directed to the Union as a witness in a criminal action. It ordered the Union to appear before the District Attorney forthwith, and to bring with it specified union records. The subpoena appears to have been issued under the authority of N. Y. Code Crim. Proc. §§ 609–613.

[9] See also *In re Atlas Lathing Corp.*, 176 Misc. 959, 29 N. Y. S. 2d 458; Hagan, Impounding and the Subpoena Duces Tecum, 26 Brooklyn L. Rev. 199, 210–211 (1960).

[10] See n. 8, *supra*.

The objections of both the corporation and the officer were sustained. Thus, there can be no doubt that under this Court's past decisions [11] the search of DeForte's office was "unreasonable" within the meaning of the Fourth Amendment.[12]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART joins, dissenting.

Until this case was decided just now it has been the law in this country, since the federal Fourth Amendment exclusionary rule was adopted in 1914, that a defendant on trial for a crime has no standing or substantive right to object to the use of papers and documents against him on the ground that those papers, belonging to someone else, had been taken from the owner in violation of the Fourth Amendment. Heretofore successful objection to use of such papers as evidence has been left to the owner whose constitutional rights had been invaded. In *Wilson* v. *United States,* 221 U. S. 361, decided in 1911, this Court in an exhaustive opinion by Mr. Justice Hughes, later Chief Justice, applied that principle by denying the benefit of the Fourth and Fifth Amendments to a corporate

[11] The Court's opinion in *Davis* v. *United States,* 328 U. S. 582, does contain dicta to the effect that there is a lesser right to privacy when government officials have a "right" to inspect the seized items. See, *e. g., id.,* at 593. However, the only holding in *Davis* was that there had been a valid consent to the search; the case "did not involve a search warrant issue." *See* v. *City of Seattle,* 387 U. S. 541, 545, n. 7.

[12] It is, of course, immaterial that the State might have been able to obtain the same papers by means which did not violate the Fourth Amendment. As Mr. Justice Holmes stated in *Silverthorne Lumber Co.* v. *United States, supra,* at 392: "[T]he rights . . . against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."

officer, even one who had helped to prepare the corporate papers summoned to be produced.[1] In *United States* v. *White*, 322 U. S. 694, decided in 1944, this Court applied the same principle in rejecting a claim of a union officer that the use of union papers and documents against him under a subpoena *duces tecum* would incriminate him. And indeed the Court in today creating its new rule is unable to cite a single previous opinion of this Court *holding* to the contrary.

In creating this new rule against the use of papers and documents which speak truthfully for themselves, the Court is putting up new hurdles and barriers bound to save many criminals from conviction. I should not object to this new rule, however, if I thought it was or could be justified by the Fourth or any other constitutional amendment. But I do not think it can. The exclusionary rule itself, even as it applies to the exclusion of the defendant's own property when illegally seized, has had only a precarious tenure in this Court. See *Adams* v. *New York*, 192 U. S. 585 (1904); *Weeks* v. *United States*, 232 U. S. 383 (1914); and my concurring opinion in *Mapp* v. *Ohio*, 367 U. S. 643, 661 (1961). I wish to repeat here what I have indicated before, that this seems to me a rather inopportune time to create a single rule more than the Constitution plainly requires to block conviction of guilty persons by keeping out probably the most reliable kind of evidence that can be offered.

A corporate or union official suffers no personal injury when the business office he occupies as an agent of the

[1] See also *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Grant* v. *United States*, 227 U. S. 74 (1913); *Essgee Co.* v. *United States*, 262 U. S. 151 (1923); *Goldstein* v. *United States*, 316 U. S. 114 (1942); *Davis* v. *United States*, 328 U. S. 582 (1946); *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Wild* v. *Brewer*, 329 F. 2d 924 (C. A. 9th Cir. 1964).

corporation or union is invaded and when records he has prepared and safeguarded as an agent are seized. The invasion by the Government may disrupt the functioning of the office, prevent employees from performing their duties, and result in disclosure of business matters the company or union wished to keep secret. But all these are injuries only to the corporation or union as such. The organization has every right to challenge such intrusions whenever they occur—if the seizure is illegal, the records obtained can be suppressed in a prosecution against the organization, and if no prosecution is initiated, the organization can obtain return of all the documents by bringing a civil action. See, *e. g., Go-Bart Importing Co.* v. *United States,* 282 U. S. 344 (1931). Such intrusions, however, involve absolutely no invasion of the "personal privacy" or security of the agent or employee as an individual, and he accordingly has no right to seek suppression of records that the corporation or union itself has made no effort to regain.

The cases decided by this Court have, until today, uniformly supported this view and rejected the sweeping new exclusionary rule now advanced by the Court. Nor in my judgment does any one of the cases relied on by the Court provide support for its holding. The Court's basic premise is that if the union papers had been taken directly from a desk used by DeForte in a union office used only by him, his standing would have been clear, without regard to any other circumstances. I have found no past decision by this Court to that effect. Neither *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920), nor *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344 (1931), mentions the question of standing at all, and it is hard to see how the Court's inference can be drawn from these cases since in both the party seeking suppression of the documents was in fact the owner of

them. Although in *Silverthorne* the objections had been raised by both the corporation and one of its officers, standing was never even mentioned from the beginning to the end of the opinion, and the Court treated both parties as the "owners" of the documents. 251 U. S., at 391. Consequently, the Court's use of Mr. Justice Holmes' reference to "outrage" in no way supports the Court's holding today, directly or indirectly.

Jones v. *United States,* 362 U. S. 257 (1960), also fails to sustain the Court's position. In that case the petitioner had been arrested in a friend's apartment and was charged with possession of narcotics found there. This Court was troubled about the "dilemma" that would be created by requiring the petitioner, in order to secure suppression of the narcotics, to swear that they were taken from his possession, thus confessing his guilt of the very offense charged against him. To avoid this situation the Court held that petitioner could make his motion to suppress without swearing to possession, either because of the dilemma itself or because as a guest in the apartment he had the "legally requisite interest in the premises." 362 U. S., at 263. The Court today puts great stress on the statement in *Jones* that "anyone legitimately on premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him." 362 U. S., at 267. With deference I must point out that this sweeping dictum is taken somewhat out of context and cannot possibly have the literal meaning attributed to it. It would be quite a hyperbole, I think, to say that the *Jones* opinion suggested that just any person who happened to be in a house against which an unreasonable search was perpetrated could ask to have all evidence obtained by that search excluded from evidence against him. As was asked by the court below, would that dictum enable a

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janitor to escape the use of evidence illegally seized from his boss? The Court apparently recognizes this problem even now, for DeForte clearly was "legitimately on [the] premises" and thus his standing should be obvious, under its reading of *Jones*, without the Court's extended discussion of "reasonable expectation" and the related limiting tests. This reasoning in terms of "expectations," however, requires conferring standing without regard to whether the agent happens to be present at the time of the search or not, a rather remarkable consequence of the statement in *Jones*. In fact the Court's opinion indicates to me that the Court is preparing the way to use *Jones* to eliminate entirely the requirement for standing to raise a search and seizure question and to permit a search to be challenged at any time, at any place, and under all circumstances, regardless of the defendant's relationship to the person or place searched or to the things seized. Any such step would elevate the Fourth Amendment to a position of importance far above that of any other constitutional provision, compare *Flast* v. *Cohen*, *ante*, p. 83, and would make it more difficult for the government to convict guilty persons who can make no claim to redress in any form since they suffered no invasion of any kind by the search itself. I would prefer to return to *Jones* itself, where we made quite clear throughout the opinion that while common-law concepts of property ownership were not controlling, standing was not automatically conferred on "anyone legitimately on [the] premises." We stressed:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 362 U. S., at 261.

In the present case I think it is entirely clear that the search was not "directed" against DeForte personally, but was addressed to and aimed at the Union and designed to secure from the Union papers belonging to the Union. The search occurred in a large room, which DeForte shared with a number of others, and the records were not taken from files and drawers used exclusively by him for his own private purposes. The police had been investigating a large conspiracy perpetrated through the Union and at the time were primarily interested in getting more information about the operation of the Union. The records taken were those that had been listed in a subpoena addressed to the Union itself, and since the Union had raised no objection to the subpoena, it was under a duty to turn over the records. Compare *Hale* v. *Henkel*, 201 U. S. 43 (1906).

Undoubtedly, I suppose, even if the Union's papers here should be returned either to the Union or to the defendant, the State could, on a new trial, summon the papers and get them and use them.[2] A rule which encourages such circumvention as that is hardly the kind of principle to which this great Court should give birth. I disclaim any responsibility whatever for the new rule.

MR. JUSTICE WHITE, dissenting.

Although the Fourth Amendment perhaps protects the individual's private desk in a union office shared with other officers or employees, I dissent from the Court's extension of the protected area to the office door.

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[2] Since the State had obtained a subpoena for these documents even before the search, the new subpoena would not be an invalid "fruit" of the illegal seizure. Compare *Silverthorne*, *supra*.

LEE ET AL. *v.* FLORIDA.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT.

No. 174. Argued May 2, 1968.—Decided June 17, 1968.

A four-party telephone line was installed in petitioner Lee's house, and shortly thereafter, by direction of the Orlando, Florida, police, a telephone in a neighboring house was connected to the same party line. The police attached equipment which permitted them to hear and record all conversations on the party line without lifting the telephone receiver. Recordings of conversations were introduced, over objection, at petitioners' trial for violation of state lottery laws. Petitioners were convicted and the state appellate court affirmed, saying "that there were no state or federal statutes applicable in Florida which would make wiretapping illegal and inadmissible in evidence. . . ." *Held:*

1. The conduct of the Orlando police clearly amounted to interception of petitioners' communications within the meaning of § 605 of the Federal Communications Act of 1934, which prohibits the interception and divulgence (conceded here) of any communication without the sender's authorization. Pp. 380–382.

2. The recordings of the illegally intercepted conversations were not admissible in evidence in the Florida courts in view of the express federal prohibition against divulgence of recordings so procured. *Schwartz* v. *Texas,* 344 U. S. 199, overruled. Pp. 382–387.

191 So. 2d 84, reversed.

Edward R. Kirkland argued the cause and filed a brief for petitioners.

Wallace E. Allbritton, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Earl Faircloth,* Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The three petitioners were convicted in a Florida trial court for violating the state lottery laws. Their con-

victions were affirmed by a Florida district court of appeal,[1] and the Supreme Court of Florida denied further review. We granted certiorari to consider the application of § 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U. S. C. § 605, to the circumstances of this case.[2] That statute provides:

> "[N]o person not being authorized by the sender shall intercept any communication and divulge . . . the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

In the summer of 1963 petitioner Lee ordered the installation of a private telephone in the house where he lived near Orlando, Florida. The local telephone company informed him that no private lines were available, and he was given a telephone on a four-party line instead. A week later, at the direction of the Orlando police department, the company connected a telephone in a neighboring house to the same party line.[3] The police attached to this telephone an automatic actuator, a tape recorder, and a set of earphones. The equipment was connected directly to the wall outlet in such a way that the police could hear and record all conversations on the party line without the necessity of lifting the receiver on their telephone. This arrangement not only afforded the police continuous access to all of Lee's outgoing and incoming calls, but also eliminated the telltale "click" that would otherwise have warned conversing parties that someone else on the line had picked up a receiver.

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[1] *Lee* v. *State*, 191 So. 2d 84.

[2] 389 U. S. 1033. Issues under the Fourth and Fourteenth Amendments were also presented in the petition for certiorari. We do not reach those issues.

[3] The record does not show how or why this house was made available to the Orlando police.

Further, the arrangement insured that noises in the house occupied by the police would not be heard by anyone else on the line. For more than a week the police used this equipment to overhear and record telephone calls to and from Lee's residence, including calls made to Lee by the other two petitioners from private as well as public telephones.

At the petitioners' trial, several of these recordings were introduced in evidence by the prosecution over objection by defense counsel. In affirming the convictions, the state appellate court said that "there were no state or federal statutes applicable in Florida which would make wiretapping illegal and inadmissible in evidence . . . ."[4]

We disagree. There clearly *is* a federal statute, applicable in Florida and every other State, that made illegal the conduct of the Orlando authorities in this case. And that statute, we hold today, also made the recordings of the petitioners' telephone conversations inadmissible as evidence in the Florida court.

I.

Section 605 of the Federal Communications Act speaks, not in terms of tapping a wire, but in terms of intercepting and divulging a communication. The State concedes that the police "divulged" the petitioners' conversations within the meaning of the statute. But, it argues, the police cannot be deemed to have "intercepted" the

[4] 191 So. 2d, at 85. The court went on to say that "wiretapping is illegal in Florida" by reason of the Florida Constitution. However, the court found that what the police did in this case did not amount to "wiretapping" within the scope of the state constitutional prohibition. The court based its conclusions upon several previous Florida cases: *Perez* v. *State*, 81 So. 2d 201; *Williams* v. *State*, 109 So. 2d 379; *Griffith* v. *State*, 111 So. 2d 282; *Barber* v. *State*, 172 So. 2d 857.

telephone conversations, because people who use party lines should realize that their conversations might be overheard.

This is not a case, however, where the police merely picked up the receiver on an ordinary party line, and we need not decide whether § 605 would be applicable in those circumstances.[5] For here the police did much more. They deliberately arranged to have a telephone connected to Lee's line without his knowledge, and they altered that connection in such a way as to permit continuous surreptitious surveillance and recording of all conversations on the line. What was done here was a far cry from the police activity in *Rathbun* v. *United States*, 355 U. S. 107, a case heavily relied upon by the respondent. There we found no interception where "a communication [is] overheard on a regularly used telephone extension with the consent of one party to the conversation," *ibid.*, and where the "extension had not been installed there just for this purpose but was a regular connection, previously placed and normally used." *Id.*, at 108. We viewed that situation as though one of the parties to the telephone conversation had simply "held out his handset so that another could hear out of it." *Id.*, at 110–111. In the present case, by contrast, there was neither "the consent of one party" nor a "regularly used" telephone "not . . . installed . . . just for [the] purpose" of surveillance. The conduct of the Orlando

[5] A party-line user's privacy is obviously vulnerable, but it does not necessarily follow that his telephone conversations are completely unprotected by § 605. In many areas of the country private telephone lines are not available; in other areas they are available only at higher rates than party lines. There is nothing in the language or history of § 605 to indicate that Congress meant to afford any less protection to those who, by virtue of geography or financial hardship, must use party-line telephones.

police, deliberately planned and carried out, clearly amounted to interception of the petitioners' communications within the meaning of § 605 of the Federal Communications Act.[6]

II.

The remaining question is whether the recordings that the police obtained by intercepting the petitioners' telephone conversations were admissible in evidence in the Florida trial court, notwithstanding the express prohibition of federal law against divulgence of recordings so procured.

Section 605 was enacted as part of the Federal Communications Act of 1934, 48 Stat. 1103, six years after the Court had said in *Olmstead* v. *United States*, 277 U. S. 438, 465, that "Congress may of course [legislate to] protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence . . . ." In *Nardone* v. *United States*, 302 U. S. 379, the Court was first called upon to decide whether § 605 had indeed served to render evidence of intercepted communications inadmissible in a federal trial. In that case the Government urged that "a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime." 302 U. S., at 383. In reversing the judgment of conviction, the Court's answer to that argument was unequivocal:

> "[T]he plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that '*no person*' shall divulge or publish the message or its

[6] Section 605 prohibits interception and divulgence of intrastate as well as interstate communications. *Weiss* v. *United States*, 308 U. S. 321.

> substance to *'any person.'* To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments.
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> . . . . .
>
> "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution." 302 U. S., at 382, 383.

Fifteen years later, in *Schwartz* v. *Texas,* 344 U. S. 199, the Court considered the question whether, despite § 605, telephone communications intercepted by state officers could lawfully be received in evidence in state criminal trials. That case was decided in the shadow of *Wolf* v. *Colorado,* 338 U. S. 25, which shortly before had held that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." 338 U. S., at 33. The Court in *Schwartz* recognized that the problem before it was "somewhat different" from the one that had been presented in *Wolf,* "because the introduction of the intercepted communications would itself be a violation" of federal law. 344 U. S., at 201. But the Court nonetheless concluded that state trial courts were not required to reject evidence violative of § 605. For if, as *Wolf* had held, state courts were free to accept evidence obtained in violation of the Federal Constitution, the

Court reasoned that they could not be required to reject evidence obtained and divulged in violation of a federal statute. That was the thrust of the *Schwartz* opinion:

> "Although the intercepted calls would be inadmissible in a federal court, it does not follow that such evidence is inadmissible in a state court. Indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court, *Wolf* v. *Colorado*, 338 U. S. 25, while such evidence, if obtained by a federal officer, would be clearly inadmissible in a federal court. *Weeks* v. *United States*, 232 U. S. 383." *Ibid.*

The fact that a state official would be violating the express terms of the federal statute by the very act of divulging the intercepted communications as evidence for the prosecution at the trial, the Court in *Schwartz* said, was "simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts." *Ibid.* But in *Benanti* v. *United States*, 355 U. S. 96, five years later, the Court returned to the teaching of *Nardone* in giving emphatic recognition to the language of the statute that itself makes illegal the divulgence of intercepted communications. In *Benanti* the Court held inadmissible in a federal trial communications that had been intercepted by state officers.[7] "Section 605," the Court said, "contains an express, absolute prohibition against the divulgence of intercepted communications." 355 U. S., at 102.

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[7] It was not until two Terms later, in *Elkins* v. *United States*, 364 U. S. 206, that the Court repudiated the "silver platter doctrine," under which evidence obtained by state officers in violation of the Fourth and Fourteenth Amendments could be received as evidence in federal courts.

After the *Benanti* decision, therefore, the only remaining support for *Schwartz* v. *Texas, supra,* was the holding in *Wolf* v. *Colorado, supra,* that state courts, unlike federal courts, were free to decide for themselves whether to condone violations of federal law by accepting the products of such violations as evidence. That doctrinal underpinning of the *Schwartz* decision was, of course, completely removed by *Mapp* v. *Ohio,* 367 U. S. 643, which overruled *Wolf* and squarely held that evidence obtained by state officers in an unreasonable search is inadmissible in a state criminal trial.

In view of the *Nardone* and *Benanti* decisions,[8] the doctrine of *Schwartz* v. *Texas* cannot survive the demise of *Wolf* v. *Colorado, supra.* In the *Mapp* case, the Court in overruling *Wolf* imposed a judicially devised exclusionary rule in order to insure that a State could not adopt rules of evidence calculated to permit the invasion of rights protected by federal organic law. In the present case the federal law itself explicitly protects intercepted communications from divulgence, in a court or any other place.

But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the "imperative of judicial integrity." *Elkins* v. *United States,* 364 U. S. 206, 222.[9] Under our Consti-

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[8] See also the second *Nardone* case, *Nardone* v. *United States,* 308 U. S. 338.

[9] "[I]t cannot be lawful to authorize what is an illegal act. . . . [I]f the police officer violates the Federal statute by tapping wires notwithstanding a warrant issued out of this court pursuant to New York law—if that act be illegal—those who set the act in motion have condoned if not instigated illegality. . . . [T]he warrant itself partakes of the breach, willful or inadvertent, of the Federal law. Such breach may not find sanction in the orders of courts charged with the support of the law of the land and with enforcing that

tution no court, state or federal, may serve as an accomplice in the willful transgression of "the Laws of the United States," laws by which "the Judges in every State [are] bound . . . ." [10]

Finally, our decision today is counseled by experience. The hope was expressed in *Schwartz* v. *Texas* that "[e]nforcement of the statutory prohibition in § 605 can be achieved under the penal provisions" of the Communications Act. 344 U. S., at 201.[11] That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of § 605 since the statute was enacted.[12] We conclude, as we concluded in *Elkins* and in *Mapp*, that

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law!" *In re Telephone Communications*, 9 Misc. 2d 121, 126, 170 N. Y. S. 2d 84, 89 (N. Y. Sup. Ct.).

See also *Application for Interception of Telephone Communications*, 23 Misc. 2d 543, 198 N. Y. S. 2d 572 (N. Y. Ct. Gen. Sess.).

Compare Judge Waterman's concurring opinion in *Pugach* v. *Dollinger*, 277 F. 2d 739 (denying injunction against state officer for violating § 605), aff'd *per curiam*, 365 U. S. 458:

"It is therefore presumptuous to assume that any New York State trial judge will acquiesce to the commission of a crime against the United States in his presence in his courtroom by a witness testifying under oath." 277 F. 2d, at 745.

[10] "[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, U. S. Const.

[11] Compare *Wolf* v. *Colorado*, 338 U. S. 25, at 30–31.

[12] In *Pugach* v. *Klein*, 193 F. Supp. 630, a defendant in a state criminal case attempted unsuccessfully to initiate a criminal prosecution against state officers for violations of § 605. See also *Simons* v. *O'Connor*, 187 F. Supp. 702 (denying damages in action against state officer for violation of § 605).

There seem to be only three reported prosecutions of private individuals for violations of § 605. *United States* v. *Gruber*, 123 F. 2d 307; *United States* v. *Gris*, 247 F. 2d 860; *Elkins* v. *United States*, 364 U. S. 206.

nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law "in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U. S., at 217.

Reversed.

MR. JUSTICE BLACK, dissenting.

In 1937, *Nardone* v. *United States,* 302 U. S. 379, held that 47 U. S. C. § 605 forbids the introduction of intercepted and divulged telephone conversations in federal courts. In *Schwartz* v. *Texas,* 344 U. S. 199 (1952), this Court held, however, that the section does not forbid the use of such evidence in state criminal trials, saying: "[W]e do not believe that Congress intended to impose a rule of evidence on the state courts." 344 U. S., at 203. I thought the holding in *Schwartz* was correct then and still think so. The Court holds, however, that § 605 now compels state courts to exclude such intercepted telephone messages from state trials. The effect of this holding is to overrule *Schwartz* v. *Texas.* The Court's holding is made despite the fact that Congress itself has not changed the section. Nor does *Mapp* v. *Ohio,* 367 U. S. 643 (1961), undermine *Schwartz* as the Court intimates, for in *Schwartz* we dealt, as we do here, with conduct that violates only a federal statute and so deserves only the sanctions contemplated by that statute. The Communications Act explicitly provides for penal sanctions, 47 U. S. C. § 501, and some civil remedies might be implied as a matter of federal law, cf. *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964). But the creation by statute of a federal substantive right does not mean that the States are required by the Supremacy Clause to give every procedural trial remedy afforded by federal courts or that failure to afford such remedies renders the State "an accomplice in the willful transgression of 'the Laws of the United States.'" *Ante,* at 386.

I think it would be more appropriate for the Court to leave this job of rewriting § 605 to the Congress. Waiting for Congress to rewrite its law, however, is too slow for the Court in this day of the rapid creation of new judicial rules, many of which inevitably tend to make conviction of criminals more difficult. I cannot agree that there is the slightest justification for overruling *Schwartz* and would affirm these Florida gambling convictions.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITE joins, dissenting.

Congress has ample power to proscribe any particular use of intercepted telephone conversations. The question here is simply whether § 605 of the Communications Act proscribes basing state criminal convictions on such interceptions. This statutory question does not involve any constitutional exclusionary rule, cf. *Mapp* v. *Ohio*, 367 U. S. 643, or the supervisory power of this Court over the lower federal courts, cf. *Weeks* v. *United States*, 232 U. S. 383.

More than 15 years ago, in *Schwartz* v. *Texas*, 344 U. S. 199, this Court decided that § 605 did not render state convictions based on such interceptions invalid. Although arguments can be made that this decision was incorrect, the matter is hardly without difficulty. It is not at all obvious that a statute which by its terms prohibits only interception and divulgence of conversations, meant also to prohibit state-court reliance on the perfectly probative evidence gained thereby.*

**Nardone* v. *United States*, 302 U. S. 379, established that divulgence of intercepted communications in court was a violation of § 605. The Court went on to hold that a federal conviction resulting from such a violation was itself improper. The Court did not, however, make it clear whether the Act required that result by its own force or the Court was simply imposing that result by virtue of its supervisory power.

It disserves the proper relation between this Court and Congress to change the long-standing interpretation of a federal statute in the absence of much more convincing evidence than is here adduced that the Court originally mistook what Congress intended. The importance of the principle of *stare decisis* of course varies with the nature of the question. It is at its highest in a case such as the present: Congress has considered the wiretapping problem many times, each time against what it naturally assumed to be a stable background of statute law. To vary that background with the inclinations of members of this Court is to frustrate orderly congressional consideration of statutory problems. I would therefore adhere to *Schwartz*.

Since the Court does not reach petitioners' further contention that the interception violated their constitutional rights, I am content to dissent from the Court's determination of the statutory question and not to express views that would, at this stage, be academic.

FORTNIGHTLY CORP. *v.* UNITED ARTISTS TELEVISION, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 618. Argued March 13, 1968.—Decided June 17, 1968.

Petitioner operates community antenna television (CATV) systems which receive, amplify, and modulate signals from five television stations, convert them to different frequencies, and transmit them to their subscribers' television sets. Petitioner does not edit the programs or originate any programs of its own. Respondent, which owns copyrights on several motion pictures, had licensed the five television stations to broadcast certain of these films. The licenses did not authorize carriage of the broadcasts by CATV, and in some instances specifically prohibited such carriage. Respondent sued petitioner, which had no copyright license from either respondent or the television stations, for copyright infringement, claiming violation of its exclusive rights under §§ 1 (c) and (d) of the Copyright Act of 1909, to "perform . . . in public for profit" (nondramatic literary works) and to "perform . . . publicly" (dramatic works). Petitioner maintained that it did not "perform" the copyrighted works at all. The District Court ruled for respondent on the infringement issue, which was tried separately, and the Court of Appeals affirmed. *Held:* Judicial construction of the Copyright Act, in the light of drastic technological changes, has treated broadcasters as exhibitors, who "perform," and viewers as members of the audience, who do not "perform," and since petitioner's CATV systems basically do no more than enhance the viewers' capacity to receive the broadcast signals, the CATV systems fall within the category of viewers, and petitioner does not "perform" the programs that its systems receive and carry. Pp. 395–402.

377 F. 2d 872, reversed.

Robert C. Barnard argued the cause for petitioner. With him on the briefs were *R. Michael Duncan* and *E. Stratford Smith.*

Louis Nizer argued the cause for respondent. With him on the brief were *Gerald Meyer, Gerald F. Phillips,* and *Lawrence S. Lesser.*

Solicitor General Griswold filed a memorandum for the United States, as *amicus curiae.*

Bruce E. Lovett filed a brief for the National Cable Television Association, Inc., as *amicus curiae,* urging reversal.

Briefs of *amici curiae,* urging affirmance, were filed by *Warner W. Gardner, William H. Dempsey, Jr.,* and *Douglas A. Anello* for the National Association of Broadcasters; by *Ambrose Doskow* for Broadcast Music, Inc.; by *Michael Finkelstein* for the All-Channel Television Society; by *Irwin Karp* for the Authors League of America, Inc.; by *Herman Finkelstein, Simon H. Rifkind, Jay H. Topkis,* and *Paul S. Adler* for the American Society of Composers, Authors and Publishers; by *Paul P. Selvin* and *William Berger* for the Writers Guild of America et al., and by *Leonard Zissu* and *Abraham Marcus* for the Screen Composers Association of the United States.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, Fortnightly Corporation, owns and operates community antenna television (CATV) systems in Clarksburg and Fairmont, West Virginia.[1] There were no local television broadcasting stations in that immediate area until 1957. Now there are two, but, because of hilly terrain, most residents of the area cannot receive the broadcasts of any additional stations by ordinary rooftop antennas. Some of the residents have joined in

[1] For a discussion of CATV systems generally, see *United States* v. *Southwestern Cable Co., ante,* at 161–164.

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erecting larger cooperative antennas in order to receive more distant stations, but a majority of the householders in both communities have solved the problem by becoming customers of the petitioner's CATV service.[2]

The petitioner's systems consist of antennas located on hills above each city, with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers. The systems contain equipment to amplify and modulate the signals received, and to convert them to different frequencies, in order to transmit the signals efficiently while maintaining and improving their strength.[3]

During 1960, when this proceeding began, the petitioner's systems provided customers with signals of five television broadcasting stations, three located in Pittsburgh, Pennsylvania; one in Steubenville, Ohio; and one in Wheeling, West Virginia.[4] The distance between those cities and Clarksburg and Fairmont ranges from 52 to 82 miles.[5] The systems carried all the programming of each of the five stations, and a customer could choose any of the five programs he wished to view by simply turning the knob on his own television set. The petitioner neither edited the programs received nor originated any programs of its own.[6] The petitioner's customers

[2] In 1960, out of 11,442 occupied housing units in the Clarksburg area, about 7,900 subscribed to the petitioner's CATV service; out of 9,079 units in Fairmont, about 5,100 subscribed.

[3] The petitioner's systems utilized modulating equipment only during the period 1958–1964.

[4] Since 1960, some changes have been made in the stations carried by each of the petitioner's systems. As of May 1, 1964, the Clarksburg system was carrying the two local stations and three of the more distant stations, and the Fairmont system was carrying one local station and four of the more distant stations.

[5] Clarksburg and Fairmont are 18 miles apart.

[6] Some CATV systems, about 10%, originate some of their own programs. We do not deal with such systems in this opinion.

were charged a flat monthly rate regardless of the amount of time that their television sets were in use.[7]

The respondent, United Artists Television, Inc., holds copyrights on several motion pictures. During the period in suit, the respondent (or its predecessor) granted various licenses to each of the five television stations in question to broadcast certain of these copyrighted motion pictures. Broadcasts made under these licenses were received by the petitioner's Clarksburg and Fairmont CATV systems and carried to its customers. At no time did the petitioner (or its predecessors) obtain a license under the copyrights from the respondent or from any of the five television stations. The licenses granted by the respondent to the five stations did not authorize carriage of the broadcasts by CATV systems, and in several instances the licenses specifically prohibited such carriage.

The respondent sued the petitioner for copyright infringement in a federal court, asking damages and injunctive relief. The issue of infringement was separately tried, and the court ruled in favor of the respondent. 255 F. Supp. 177. On interlocutory appeal under 28 U. S. C. § 1292 (b), the Court of Appeals for the Second Circuit affirmed. 377 F. 2d 872. We granted certiorari, 389 U. S. 969, to consider an important question under the Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U. S. C. § 1 *et seq.*

The Copyright Act does not give a copyright holder control over all uses of his copyrighted work.[8] Instead,

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[7] The monthly rate ranged from $3.75 to $5, and customers were also charged an installation fee. Increased charges were levied for additional television sets and for commercial establishments.

[8] See, *e. g., Fawcett Publications* v. *Elliot Publishing Co.*, 46 F. Supp. 717; *Hayden* v. *Chalfant Press, Inc.*, 281 F. 2d 543, 547–548. "The fundamental [is] that 'use' is not the same thing as 'infringement,' that use short of infringement is to be encouraged . . . ." B. Kaplan, An Unhurried View of Copyright 57 (1967).

§ 1 of the Act enumerates several "rights" that are made "exclusive" to the holder of the copyright.[9] If a person, without authorization from the copyright holder, puts a

[9] "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

"(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

"(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . . ." 17 U. S. C. § 1.

copyrighted work to a use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe.[10] The respondent's contention is that the petitioner's CATV systems infringed the respondent's § 1 (c) exclusive right to "perform . . . in public for profit" (nondramatic literary works)[11] and its § 1 (d) exclusive right to "perform . . . publicly" (dramatic works).[12] The petitioner maintains that its CATV systems did not "perform" the copyrighted works at all.[13]

At the outset it is clear that the petitioner's systems did not "perform" the respondent's copyrighted works in any conventional sense of that term,[14] or in any manner envisaged by the Congress that enacted the law in 1909.[15] But our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here.[16] In 1909 radio

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[10] The Copyright Act does not contain a definition of infringement as such. Rather infringement is delineated in a negative fashion by the § 1 enumeration of rights exclusive to the copyright holder. See M. Nimmer, Copyright § 100 (1968).

[11] See n. 9, *supra*. We do not reach the petitioner's claim that the respondent's animated cartoons are not "literary works."

[12] See n. 9, *supra*.

[13] The petitioner also contends that if it did "perform" the copyrighted works, it did not do so "in public."

[14] Cf. *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1.

[15] The legislative history shows that the attention of Congress was directed to the situation where the dialogue of a play is transcribed by a member of the audience, and thereafter the play is produced by another party with the aid of the transcript. H. R. Rep. No. 2222, 60th Cong., 2d Sess., 4 (1909).

[16] "While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries." *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411.

itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change.[17]

The Court of Appeals thought that the controlling question in deciding whether the petitioner's CATV systems "performed" the copyrighted works was: "[H]ow much did the [petitioner] do to bring about the viewing and hearing of a copyrighted work?" 377 F. 2d, at 877. Applying this test, the court found that the petitioner did "perform" the programs carried by its systems.[18] But

[17] A revision of the 1909 Act was begun in 1955 when Congress authorized a program of studies by the Copyright Office. Progress has not been rapid. The Copyright Office issued its report in 1961. Register of Copyrights, Report on the General Revision of the U. S. Copyright Law, House Judiciary Committee Print, 87th Cong., 1st Sess. (1961). Revision bills were introduced in the House in the Eighty-eighth Congress and in both the House and the Senate in the Eighty-ninth Congress. See H. R. 11947, 88th Cong., 2d Sess.; Hearings on H. R. 4347, 5680, 6831, 6835 before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess. (1965); Hearings on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 89th Cong., 2d Sess. (1966). H. R. 4347 was reported favorably by the House Judiciary Committee, H. R. Rep. No. 2237, 89th Cong., 2d Sess. (1966), but not enacted. In the Ninetieth Congress revision bills were again introduced in both the House (H. R. 2512) and the Senate (S. 597). The House bill was again reported favorably, H. R. Rep. No. 83, 90th Cong., 1st Sess. (1967), and this time, after amendment, passed by the full House. 113 Cong. Rec. 9021. The bill as reported contained a provision dealing with CATV, but the provision was struck from the bill on the House floor prior to enactment. See n. 33, *infra*. The House and Senate bills are currently pending before the Senate Subcommittee on Patents, Trademarks, and Copyrights.

[18] The court formulated and applied this test in the light of this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191. See also *Society of European Stage Authors & Composers* v. *New York Hotel Statler Co.*, 19 F. Supp. 1. But in *Jewell-LaSalle*, a hotel received on a master radio set an unauthorized broadcast of a copyrighted work and transmitted that broadcast

mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement—not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer. Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception.

Television viewing results from combined activity by broadcasters and viewers. Both play active and indispensable roles in the process; neither is wholly passive. The broadcaster selects and procures the program to be viewed. He may produce it himself, whether "live" or with film or tape, or he may obtain it from a network or some other source. He then converts the visible images and audible sounds of the program into electronic signals,[19] and broadcasts the signals at radio frequency for public reception.[20] Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert

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to all the public and private rooms of the hotel by means of speakers installed by the hotel in each room. The Court held the hotel liable for infringement but noted that the result might have differed if, as in this case, the original broadcast had been authorized by the copyright holder. 283 U. S., at 199, n. 5. The *Jewell-LaSalle* decision must be understood as limited to its own facts. See n. 30, *infra*.

[19] If the broadcaster obtains his program from a network, he receives the electronic signals directly by means of telephone lines or microwave.

[20] Broadcasting is defined under the Communications Act of 1934 as "the dissemination of radio communications intended to be received by the public . . . ." 47 U. S. C. § 153 (*o*).

them into the visible images and audible sounds of the program. The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer.[21]

The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act,[22] broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform.[23] Viewers do not perform.[24] Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn

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[21] See Hearings on H. R. 4347, 5680, 6831, 6835 before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess., at 1312–1318 (1965).

[22] See n. 15, *supra*.

[23] *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (radio broadcast); *Associated Music Publishers* v. *Debs Memorial Radio Fund*, 141 F. 2d 852 (radio broadcast of recorded program); *Select Theatres Corp.* v. *Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (D. C. S. D. N. Y.) (radio broadcast of program received from network). Congress in effect validated these decisions in 1952 when it added to § 1 (c) a special damages provision for "infringement by broadcast." 66 Stat. 752.

[24] "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law." *Buck* v. *Debaum*, 40 F. 2d 734, 735.

"[T]hose who listen do not perform . . . ." *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F. 2d 829.

between them. One is treated as active performer; the other, as passive beneficiary.

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line.[25] Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set.[26] It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer.[27]

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[25] While we speak in this opinion generally of CATV, we necessarily do so with reference to the facts of this case.

[26] Cf. *Lilly* v. *United States*, 238 F. 2d 584, 587:

"[T]his community antenna service was a mere adjunct of the television receiving sets with which it was connected . . . ."

[27] The District Court's decision was based in large part upon its analysis of the technical aspects of the petitioner's systems. The systems have contained at one time or another sophisticated equipment to amplify, modulate, and convert to different frequencies the signals received—operations which all require the introduction of local energy into the system. The court concluded that the signal delivered to subscribers was not the same signal as that initially received off the air. 255 F. Supp., at 190–195. The Court of Appeals refused to attach significance to the particular technology of the petitioner's systems, 377 F. 2d, at 879, and we agree. The electronic operations performed by the petitioner's systems are those necessary to transmit the received signal the length of the cable efficiently and deliver a signal of adequate strength. Most of the same operations are performed by individual television sets and antennas. See Hearings on H. R. 4347 before Subcommittee No. 3 of the House Judiciary Committee, *supra*, at 1312–1318. Whether or not the signals received and delivered are the "same," the entire process is virtually instantaneous, and electronic "information" received and delivered is identical. 255 F. Supp., at 192.

If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

The function of CATV systems has little in common with the function of broadcasters.[28] CATV systems do not in fact broadcast or rebroadcast.[29] Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV

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[28] Cf. *Intermountain Broadcasting & Television Corp.* v. *Idaho Microwave, Inc.*, 196 F. Supp. 315, 325:

"[Broadcasters] and [CATV systems] are not engaged in the same kind of business. They operate in different ways for different purposes.

"[Broadcasters] are in the business of selling their broadcasting time and facilities to the sponsors to whom they look for their profits. They do not and cannot charge the public for their broadcasts which are beamed directly, indiscriminately and without charge through the air to any and all reception sets of the public as may be equipped to receive them.

"[CATV systems], on the other hand, have nothing to do with sponsors, program content or arrangement. They sell community antenna service to a segment of the public for which [broadcasters'] programs were intended but which is not able, because of location or topographical condition, to receive them without rebroadcast or other relay service by community antennae. . . ."

[29] *Cable Vision, Inc.* v. *KUTV, Inc.*, 211 F. Supp. 47, vacated on other grounds, 335 F. 2d 348; *Report and Order on CATV and TV Repeater Services*, 26 F. C. C. 403, 429–430.

operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.[30]

We have been invited by the Solicitor General in an *amicus curiae* brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy.[31] We decline the invitation.[32] That job is for Congress.[33] We take the Copyright Act of 1909

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[30] It is said in dissent that, "Our major object . . . should be to do as little damage as possible to traditional copyright principles and to business relationships, until the Congress legislates . . . ." *Post*, at 404. But existing "business relationships" would hardly be preserved by extending a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context, *post*, at 405, n. 3, so as retroactively to impose copyright liability where it has never been acknowledged to exist before. See n. 18, *supra*.

[31] Compare, *e. g.*, Note, CATV and Copyright Liability, 80 Harv. L. Rev. 1514 (1967); Note, CATV and Copyright Liability: On a Clear Day You Can See Forever, 52 Va. L. Rev. 1505 (1966); B. Kaplan, An Unhurried View of Copyright 104–106 (1967); Statement of then Acting Assistant Attorney General (Antitrust Division) Zimmerman, Hearings on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 89th Cong., 2d Sess., at 211–219 (1966).

[32] The Solicitor General would have us hold that CATV systems do perform the programs they carry, but he would have us "imply" a license for the CATV "performances." This "implied in law" license would not cover all CATV activity but only those instances in which a CATV system operates within the "Grade B Contour" of the broadcasting station whose signal it carries. The Grade B contour is a theoretical FCC concept defined as the outer line along which reception of acceptable quality can be expected at least 90% of the time at the best 50% of locations. Sixth Report and Order, 17 Fed. Reg. 3905, 3915. Since we hold that the petitioner's systems did not perform copyrighted works, we do not reach the question of implied license.

[33] The copyright revision bill recently passed by the House, see n. 17, *supra*, originally contained a detailed and somewhat complex provision covering CATV. H. R. 2512, 90th Cong., 1st Sess., § 111.

as we find it. With due regard to changing technology, we hold that the petitioner did not under that law "perform" the respondent's copyrighted works.

The judgment of the Court of Appeals is *Reversed.*

MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN took no part in the decision of this case.

MR. JUSTICE FORTAS, dissenting.

This case calls not for the judgment of Solomon but for the dexterity of Houdini. We are here asked to consider whether and how a technical, complex, and specific Act of Congress, the Copyright Act, which was enacted in 1909, applies to one of the recent products of scientific

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Congressman Poff described the bill in terms of its effect on the District Court's decision in the present case:

"By, in effect, repealing the court decision which would impose full copyright liability on all CATV's in all situations, the committee recommends H. R. 2512, which would exempt them in some situations, make them fully liable in some, and provide limited liability in others." 113 Cong. Rec. 8588.

See H. R. Rep. No. 83, 90th Cong., 1st Sess., 6–7, 48–59 (1967). On the House floor the CATV provision was deleted in order to refer the matter to the Interstate and Foreign Commerce Committee, which has jurisdiction over communications. 113 Cong. 8598–8601, 8611–8613, 8618–8622, 8990–8992. In urging deletion of the CATV provision, Congressman Moore said:

"[W]hat we seek to do in this legislation is control CATV by copyright. I say that is wrong. I feel if there is to be supervision of this fast-growing area of news media and communications media, it should legitimately come to this body from the legislative committee that has direct jurisdiction over the same.

". . . This bill and the devices used to effect communications policy are not proper functions of copyright . . . ." 113 Cong. Rec. 8599.

and promotional genius, CATV. The operations of CATV systems are based upon the use of other people's property. The issue here is whether, for this use, the owner of copyrighted material should be compensated. From a technical standpoint the question—or at least one important question—is whether the use constitutes a "performance" of the copyrighted material within the meaning of § 1 (c) of the Copyright Act, 17 U. S. C. § 1 (c). But it is an understatement to say that the Copyright Act, including the concept of a "performance," was not created with the development of CATV in mind. The novelty of the use, incident to the novelty of the new technology, results in a baffling problem. Applying the normal jurisprudential tools—the words of the Act, legislative history, and precedent—to the facts of the case is like trying to repair a television set with a mallet. And no aid may be derived from the recent attempts of Congress to formulate special copyright rules for CATV—for Congress has vacillated in its approach.[1]

At the same time, the implications of any decision we may reach as to the copyright liability of CATV are very great. On the one hand, it is darkly predicted that the imposition of full liability upon all CATV operations could result in the demise of this new, important instrument of mass communications; or in its becoming a tool of the powerful networks which hold a substantial number of copyrights on materials used in the television industry. On the other hand, it is foreseen that a decision to the effect that CATV systems never infringe the copyrights of the programs they carry would permit such systems to overpower local broadcasting stations

[1] See B. Kaplan, An Unhurried View of Copyright 105–106, 127–128 (1967).

which must pay, directly or indirectly, for copyright licenses and with which CATV is in increasing competition.[2]

The vastness of the competing considerations, the complexity of any conceivable equitable solution to the problems posed, and the obvious desirability of ultimately leaving the solution to Congress induced the Solicitor General, in a memorandum filed prior to oral argument in this case, to recommend "that the Court should stay its hand because, in our view, the matter is not susceptible of definitive resolution in judicial proceedings and plenary consideration here is likely to delay and prejudice the ultimate legislative solution."

That is a splendid thought, but unhappily it will not do. I agree with the majority that we must pass on the instant case. An important legal issue is involved. Important economic values are at stake, and it would be hazardous to assume that Congress will act promptly, comprehensively, and retroactively. But the fact that the Copyright Act was written in a different day, for different factual situations, should lead us to tread cautiously here. Our major object, I suggest, should be to do as little damage as possible to traditional copyright principles and to business relationships, until the Congress legislates and relieves the embarrassment which we and the interested parties face.

The opinion of the majority, in my judgment, does not heed this admonition. In an attempt to foster the development of CATV, the Court today abandons the

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[2] The Solicitor General, in his brief on the merits, recommends that we adopt a compromise approach—finding a license implied in law with respect to some CATV operations, but not with respect to others. Regardless of the advisability of such an approach from the standpoint of communications, antitrust, and other relevant policies, I do not believe it is open to us, in construing the Copyright Act, to accept the Solicitor General's proposal.

teachings of precedent, including a precedent of this Court (see *Buck* v. *Jewell-LaSalle Realty Corp.*, 283 U. S. 191 (1931); *Society of European Stage Authors and Composers* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (1937)), as to the meaning of the term "perform" in the Copyright Act. It is not our general practice to reverse ourselves, without compelling reasons to do so, on matters of statutory construction, especially on a construction of many years' standing under which an entire industry has operated.[3] Yet today's decision might not be objectionable, if the majority replaced what it considers an outmoded interpretation of the term "perform" with a new, equally clear, and workable interpretation. It does not, however, do this. It removes from copyright law an interpretation which, though perhaps not altogether satisfactory as an analytical matter,[4] has at least been settled for nearly 40 years; and it substitutes for that discarded interpretation a rule which I do not believe is an intelligible guide for the construction of the Copyright Act. Moreover, the new rule may well have disruptive consequences outside the area of CATV.

The approach manifested in the opinion of the Court is disarmingly simple. The Court merely identifies two groups in the general field of television, one of which it believes may clearly be liable, and the other clearly not liable, for copyright infringement on a "performance"

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[3] Nimmer, a leading authority in the copyright field, states that although "the two major performing right societies, ASCAP and BMI, do not choose to enforce the Jewell-LaSalle doctrine to its logical extreme in that they do not demand performing licenses from commercial establishments such as bars and restaurants which operate radio or television sets for the amusement of their customers, . . . such demands are made of hotels which operate in the manner of the LaSalle Hotel." M. Nimmer, Copyright § 107.41, n. 204 (1968).

[4] See M. Nimmer, Copyright § 107.41 (1968).

theory: "Broadcasters perform. Viewers do not perform." From this premise, the Court goes on to hold that CATV "falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's set. . . . CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer." *Ante*, at 398–399.

The decision in *Buck* v. *Jewell-LaSalle*, must, the Court says today, "be understood as limited to its own facts." *Ante*, at 397, n. 18. In *Buck*, the Court, speaking unanimously through Mr. Justice Brandeis, held that a hotel which received a broadcast on a master radio set and piped the broadcast to all public and private rooms of the hotel had "performed" the material that had been broadcast. As I understand the case, the holding was that the use of mechanical equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy constitutes a "performance" of the material originally broadcast. I believe this decision stands squarely in the path of the route which the majority today traverses. If a CATV system performs a function "little different from that served by the equipment generally furnished by a television viewer," and if that is to be the test, then it seems to me that a master radio set attached by wire to numerous other sets in various rooms of a hotel cannot be distinguished.[5]

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[5] The majority attempts to diminish the compelling authority of *Buck* v. *Jewell-LaSalle*, by referring to a vague footnote in that opinion to the effect that the Court might not have found a "performance" if the original broadcast, which was picked up by the hotel and brought to its various rooms, had been authorized by the

The vague "functional" test of the meaning of the term "perform" is, moreover, unsatisfactory. Just as a CATV system performs (on the majority's analysis) the same function as the antenna of the individual viewer, so a television camera recording a live drama performs the same function as the eye of a spectator who is present in the theater. Both the CATV and the television camera "receive programs that have been released to the public and carry them by private channels to additional viewers." *Ante,* at 400. Moreover, the Court has indulged in an oversimplification of the "function" of CATV. It may be, indeed, that insofar as CATV operations are limited to the geographical area which the licensed broadcaster (whose signals the CATV has picked up and carried) has the power to cover, a CATV is little more than a "cooperative antenna" employed in order to ameliorate the image on television screens at home or to bring the image to homes which, because of obstacles other than mere distance, could not receive them. But such a description will not suffice for the case in which a CATV has picked up the signals of a licensed broadcaster and carried them beyond the area—however that area be defined—which the broadcaster normally serves. In such a case the CATV *is* performing a function different from a simple antenna for, by hypothesis, the antenna could not pick up the signals of the licensed broadcaster and enable CATV patrons to receive them in their homes.

Buck v. *Jewell-LaSalle* may not be an altogether ideal gloss on the word "perform," but it has at least the merit of being settled law. I would not overrule that decision

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copyright holder—as it was not. I cannot understand the point. Whatever might be the case in a contributory infringement action (which this is not), the interpretation of the term "perform" cannot logically turn on the question whether the material that is used is licensed or not licensed.

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in order to take care of this case or the needs of CATV. This Court may be wrong. The task of caring for CATV is one for the Congress. Our ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish.

I see no alternative to following *Buck* and to holding that a CATV system does "perform" the material it picks up and carries. I would, accordingly, affirm the decision below.

Syllabus.

JONES ET UX. *v.* ALFRED H. MAYER CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 645. Argued April 1–2, 1968.—Decided June 17, 1968.

Petitioners, alleging that respondents had refused to sell them a home for the sole reason that petitioner Joseph Lee Jones is a Negro, filed a complaint in the District Court, seeking injunctive and other relief. Petitioners relied in part upon 42 U. S. C. § 1982, which provides that all citizens "shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." The District Court dismissed the complaint and the Court of Appeals affirmed, concluding that § 1982 applies only to state action and does not reach private refusals to sell. *Held:*

1. Congress' enactment of the Civil Rights Act of 1968, containing in Title VIII detailed housing provisions applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority, had no effect upon this litigation or upon § 1982, a general statute limited to racial discrimination in the sale and rental of property and enforceable only by private parties acting on their own initiative. Pp. 413–417.

2. Section 1982 applies to all racial discrimination in the sale or rental of property. Pp. 417–437.

(a) Section 1982 has previously been construed to do more than grant Negro citizens the general legal capacity to buy and rent property free of prohibitions that wholly disable them because of their race. *Hurd* v. *Hodge*, 334 U. S. 24. Pp. 417–419.

(b) The question whether *purely* private discrimination unaided by any governmental action violates § 1982 remains one of first impression in this Court. *Hurd* v. *Hodge*, *supra*; *Corrigan* v. *Buckley*, 271 U. S. 323; the *Civil Rights Cases*, 109 U. S. 3; and *Virginia* v. *Rives*, 100 U. S. 313, distinguished. Pp. 419–420.

(c) On its face, the language of § 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property. Pp. 420–422.

(d) The legislative history of § 1982, which was part of § 1 of the Civil Rights Act of 1866, likewise shows that both Houses of Congress believed that they were enacting a comprehensive statute

forbidding every form of racial discrimination affecting the basic civil rights enumerated therein—including the right to purchase or lease property—and thereby securing all such rights against interference from any source whatever, whether governmental or private. Pp. 422–436.

(e) The scope of the 1866 Act was not altered when it was re-enacted in 1870, two years after ratification of the Fourteenth Amendment. Pp. 436–437.

(f) That § 1982 lay partially dormant for many years does not diminish its force today. P. 437.

3. Congress has power under the Thirteenth Amendment to do what 42 U. S. C. § 1982 purports to do. Pp. 437–444.

(a) Because the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States," *Civil Rights Cases*, 109 U. S. 3, 20, it has never been doubted "that the power vested in Congress to enforce the article by appropriate legislation," *ibid.*, includes the power to enact laws "operating upon the acts of individuals, whether sanctioned by State legislation or not." *Id.*, at 23. See *Clyatt* v. *United States*, 197 U. S. 207. P. 438.

(b) The Thirteenth Amendment authorized Congress to do more than merely dissolve the legal bond by which the Negro slave was held to his master; it gave Congress the power rationally to determine what are the badges and the incidents of slavery and the authority to translate that determination into effective legislation. Pp. 439–440.

(c) Whatever else they may have encompassed, the badges and incidents of slavery that the Thirteenth Amendment empowered Congress to eliminate included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Civil Rights Cases*, 109 U. S. 3, 22. Insofar as *Hodges* v. *United States*, 203 U. S. 1, suggests a contrary holding, it is overruled. Pp. 441–443.

379 F. 2d 33, reversed.

Samuel H. Liberman argued the cause for petitioners. With him on the brief were *Arthur Allen Leff* and *Samuel A. Chaitovitz.*

Israel Treiman argued the cause and filed a brief for respondents.

Attorney General Clark argued the cause for the United States, as *amicus curiae*, urging reversal. With him on the brief were *Solicitor General Griswold*, *Assistant Attorney General Pollak*, *Louis F. Claiborne*, and *Brian K. Landsberg*.

Briefs of *amici curiae*, urging reversal, were filed by *Thomas C. Lynch*, Attorney General, *Charles A. O'Brien*, Chief Deputy Attorney General, and *Loren Miller, Jr.*, and *Philip M. Rosten*, Deputy Attorneys General, for the State of California; by *Frank J. Kelley*, Attorney General, *Robert A. Derengoski*, Solicitor General, and *Carl Levin*, Assistant Attorney General, for the State of Michigan (Civil Rights Commission); by *Norman H. Anderson*, Attorney General, *C. B. Burns, Jr.*, Special Assistant Attorney General, and *Louis C. Defeo, Jr.*, and *Deann Duff*, Assistant Attorneys General, for the Missouri Commission on Human Rights; by *Richard W. Mason, Jr.*, *Ilus W. Davis*, and *Joseph H. McDowell* for Kansas City, Missouri, and Kansas City, Kansas; by *Leo Pfeffer* and *Melvin L. Wulf* for the American Civil Liberties Union et al.; by *Sol Rabkin*, *Robert L. Carter*, *Joseph B. Robison*, *Arnold Forster*, *Paul Hartman*, and *Beverly Coleman* for the National Committee against Discrimination in Housing et al.; by *John Ligtenberg* and *Andrew J. Leahy* for the American Federation of Teachers et al.; by *James I. Huston* for the Path Association; by *William B. Ball* for the National Catholic Conference for Interracial Justice et al.; by *Charles H. Tuttle* and *Robert Walston Chubb* for the National Council of Churches of Christ in the United States et al.; by *Edwin J. Lukas* for the American Jewish Committee et al., and by *Henry S. Reuss*, *pro se*, and *Phineas Indritz* for Henry S. Reuss.

Brief of *amici curiae*, urging affirmance, was filed by *George Washington Williams* and *Thomas F. Cadwalader* for the Maryland Petition Committee, Inc., et al.

MR. JUSTICE STEWART delivered the opinion of the Court.

In this case we are called upon to determine the scope and the constitutionality of an Act of Congress, 42 U. S. C. § 1982, which provides that:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

On September 2, 1965, the petitioners filed a complaint in the District Court for the Eastern District of Missouri, alleging that the respondents had refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that petitioner Joseph Lee Jones is a Negro. Relying in part upon § 1982, the petitioners sought injunctive and other relief.[1] The District Court sustained the respondents' motion to dismiss the complaint,[2] and the Court of Appeals for the Eighth Circuit affirmed, concluding that § 1982 applies only to state action and does not reach private refusals to sell.[3] We granted certiorari to consider the

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[1] To vindicate their rights under 42 U. S. C. § 1982, the petitioners invoked the jurisdiction of the District Court to award "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." 28 U. S. C. § 1343 (4). In such cases, federal jurisdiction does not require that the amount in controversy exceed $10,000. Cf. *Douglas* v. *City of Jeannette*, 319 U. S. 157, 161; *Hague* v. *C. I. O.*, 307 U. S. 496, 507–514, 527–532.

[2] 255 F. Supp. 115.

[3] 379 F. 2d 33.

questions thus presented.[4] For the reasons that follow, we reverse the judgment of the Court of Appeals. We hold that § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.[5]

I.

At the outset, it is important to make clear precisely what this case does *not* involve. Whatever else it may be, 42 U. S. C. § 1982 is not a comprehensive open housing law. In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 81, the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.[6] It does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling.[7] It does not prohibit advertising or other representations that indicate discriminatory preferences.[8] It does not refer explicitly to discrimination in financing arrangements[9] or in the provision of brokerage services.[10] It does not empower

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[4] 389 U. S. 968.

[5] Because we have concluded that the discrimination alleged in the petitioners' complaint violated a federal statute that Congress had the power to enact under the Thirteenth Amendment, we find it unnecessary to decide whether that discrimination also violated the Equal Protection Clause of the Fourteenth Amendment.

[6] Contrast the Civil Rights Act of 1968, § 804 (a).

[7] Contrast § 804 (b).

[8] Contrast §§ 804 (c), (d), (e).

[9] Contrast § 805.

[10] Contrast § 806. In noting that 42 U. S. C. § 1982 differs from the Civil Rights Act of 1968 in not dealing explicitly and exhaustively with such matters (see also nn. 7 and 9, *supra*), we intimate

a federal administrative agency to assist aggrieved parties.[11] It makes no provision for intervention by the Attorney General.[12] And, although it can be enforced by injunction,[13] it contains no provision expressly authorizing a federal court to order the payment of damages.[14]

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no view upon the question whether ancillary services or facilities of this sort might in some situations constitute "property" as that term is employed in § 1982. Nor do we intimate any view upon the extent to which discrimination in the provision of such services might be barred by 42 U. S. C. § 1981, the text of which appears in n. 78, *infra*.

[11] Contrast the Civil Rights Act of 1968, §§ 808–811.

[12] Contrast § 813 (a).

[13] The petitioners in this case sought an order requiring the respondents to sell them a "Hyde Park" type of home on Lot No. 7147, or on "some other lot in [the] subdivision sufficient to accommodate the home selected . . . ." They requested that the respondents be enjoined from disposing of Lot No. 7147 while litigation was pending, and they asked for a permanent injunction against future discrimination by the respondents "in the sale of homes in the Paddock Woods subdivision." The fact that 42 U. S. C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy. See, *e. g.*, *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 568-570; *Deckert* v. *Independence Corp.*, 311 U. S. 282, 288; *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 491–492; *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432–435. Cf. *Ex parte Young*, 209 U. S. 123; *Griffin* v. *School Board*, 377 U. S. 218.

[14] Contrast the Civil Rights Act of 1968, § 812 (c). The complaint in this case alleged that the petitioners had "suffered actual damages in the amount of $50.00," but no facts were stated to support or explain that allegation. Upon receiving the injunctive relief to which they are entitled, see n. 13, *supra*, the petitioners will presumably be able to purchase a home from the respondents at the price prevailing at the time of the wrongful refusal in 1965—substantially less, the petitioners concede, than the current market value of the property in question. Since it does not appear that the petitioners will then have suffered any uncompensated injury, we need not decide here whether, in some circumstances, a party

Thus, although § 1982 contains none of the exemptions that Congress included in the Civil Rights Act of 1968,[15] it would be a serious mistake to suppose that § 1982 in any way diminishes the significance of the law recently enacted by Congress. Indeed, the Senate Subcommittee on Housing and Urban Affairs was informed in hearings held after the Court of Appeals had rendered its decision in this case that § 1982 might well be "a presently valid federal statutory ban against discrimination by private persons in the sale or lease of real property." [16] The Subcommittee was told, however, that even if this Court should so construe § 1982, the existence of that statute would not "eliminate the need for congressional action" to spell out "responsibility on the part of the federal government to enforce the rights it protects." [17] The point was made that, in light of the many difficulties

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aggrieved by a violation of § 1982 might properly assert an implied right to compensatory damages. Cf. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39–40; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 207; *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 202, 204. See generally *Bell* v. *Hood*, 327 U. S. 678, 684. See also 42 U. S. C. § 1988. In no event, on the facts alleged in the present complaint, would the petitioners be entitled to punitive damages. See *Philadelphia, Wilmington, & Baltimore R. Co.* v. *Quigley*, 21 How. 202, 213–214. Cf. *Barry* v. *Edmunds*, 116 U. S. 550, 562–565; *Wills* v. *Trans World Airlines, Inc.*, 200 F. Supp. 360, 367–368. We intimate no view, however, as to what damages might be awarded in a case of this sort arising in the future under the Civil Rights Act of 1968.

[15] See §§ 803 (b), 807.

[16] Hearings on S. 1358, S. 2114, and S. 2280 before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 229. These hearings were a frequent point of reference in the debates preceding passage of the 1968 Civil Rights Act. See, *e. g.*, 114 Cong. Rec. S1387 (Feb. 16, 1968), S1453 (Feb. 20, 1968), S1641 (Feb. 26, 1968), S1788 (Feb. 27, 1968).

[17] Hearings, *supra*, n. 16, at 229.

confronted by private litigants seeking to enforce such rights on their own, "legislation is needed to establish federal machinery for enforcement of the rights guaranteed under Section 1982 of Title 42 even if the plaintiffs in Jones v. Alfred H. Mayer Company should prevail in the United States Supreme Court." [18]

On April 10, 1968, Representative Kelly of New York focused the attention of the House upon the present case and its possible significance. She described the background of this litigation, recited the text of § 1982, and then added:

> "When the Attorney General was asked in court about the effect of the old law [§ 1982] as compared with the pending legislation which is being considered on the House floor today, he said that the scope was somewhat different, the remedies and procedures were different, and that the new law was still quite necessary." [19]

Later the same day, the House passed the Civil Rights Act of 1968. Its enactment had no effect upon § 1982 [20]

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[18] *Id.*, at 230. See also *id.*, at 129, 162–163, 251. And see Hearings on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H. R. 2516, and H. R. 10805 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 416.

[19] 114 Cong. Rec. H2807 (April 10, 1968). See also *id.*, at H2808. The Attorney General of the United States stated during the oral argument in this case that the Civil Rights Act then pending in Congress "would provide open housing rights on a complicated statutory scheme, including administrative, judicial, and other sanctions for its effectuation . . . ." "Its potential for effectiveness," he added, "is probably much greater than [§ 1982] because of the sanctions and the remedies that it provides."

[20] At oral argument, the Attorney General expressed the view that, if Congress should enact the pending bill, § 1982 would not be affected in any way but "would stand independently." That is, of course, correct. The Civil Rights Act of 1968 does not mention 42 U. S. C. § 1982, and we cannot assume that Congress intended

and no effect upon this litigation,[21] but it underscored the vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority. Having noted these differences, we turn to a consideration of § 1982 itself.

II.

This Court last had occasion to consider the scope of 42 U. S. C. § 1982 in 1948, in *Hurd* v. *Hodge,* 334 U. S. 24. That case arose when property owners in the District of Columbia sought to enforce racially restrictive covenants against the Negro purchasers of several homes on their block. A federal district court enforced the restrictive agreements by declaring void the deeds of the Negro purchasers. It enjoined further attempts to sell or lease them the properties in question and directed them to "remove themselves and all of their personal belongings" from the premises within 60 days. The

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to effect any change, either substantive or procedural, in the prior statute. See *United States* v. *Borden Co.,* 308 U. S. 188, 198–199. See also § 815 of the 1968 Act: "Nothing in this title shall be construed to invalidate or limit any law of . . . any . . . jurisdiction in which this title shall be effective, that grants, guarantees, or protects the . . . rights . . . granted by this title . . . ."

[21] On April 22, 1968, we requested the views of the parties as to what effect, if any, the enactment of the Civil Rights Act of 1968 had upon this litigation. The parties and the Attorney General, representing the United States as *amicus curiae,* have informed us that the respondents' housing development will not be covered by the 1968 Act until January 1, 1969; that, even then, the Act will have no application to cases where, as here, the alleged discrimination occurred prior to April 11, 1968, the date on which the Act

Court of Appeals for the District of Columbia Circuit affirmed,[22] and this Court granted certiorari [23] to decide whether § 1982, then § 1978 of the Revised Statutes of 1874, barred enforcement of the racially restrictive agreements in that case.

The agreements in *Hurd* covered only two-thirds of the lots of a single city block, and preventing Negroes from buying or renting homes in that specific area would not have rendered them ineligible to do so elsewhere in the city. Thus, if § 1982 had been thought to do no more than grant Negro citizens the legal capacity to buy and rent property free of prohibitions that wholly disabled them because of their race, judicial enforcement of the restrictive covenants at issue would not have violated § 1982. But this Court took a broader view of the statute. Although the covenants could have been enforced without denying the general right of Negroes to purchase or lease real estate, the enforcement of those covenants would nonetheless have denied the Negro purchasers "the same right 'as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.'" 334 U. S., at 34. That result, this Court concluded, was prohibited by

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became law; and that, if the Act were deemed applicable to such cases, the petitioners' claim under it would nonetheless be barred by the 180-day limitation period of §§ 810 (b) and 812 (a).

Nor did the passage of the 1968 Act after oral argument in this case furnish a basis for dismissing the writ of certiorari as improvidently granted. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, relied upon in dissent, *post*, at 479, was quite unlike this case, for the statute that belatedly came to the Court's attention in *Rice* reached precisely the same situations that would have been covered by a decision in this Court sustaining the petitioner's claim on the merits. The coverage of § 1982, however, is markedly different from that of the Civil Rights Act of 1968.

[22] 82 U. S. App. D. C. 180, 162 F. 2d 233.

[23] 332 U. S. 789.

§ 1982. To suggest otherwise, the Court said, "is to reject the plain meaning of language." *Ibid.*

Hurd v. *Hodge, supra,* squarely held, therefore, that a Negro citizen who is denied the opportunity to purchase the home he wants "[s]olely because of [his] race and color," 334 U. S., at 34, has suffered the kind of injury that § 1982 was designed to prevent. Accord, *Buchanan* v. *Warley,* 245 U. S. 60, 79; *Harmon* v. *Tyler,* 273 U. S. 668; *Richmond* v. *Deans,* 281 U. S. 704. The basic source of the injury in *Hurd* was, of course, the action of private individuals—white citizens who had agreed to exclude Negroes from a residential area. But an arm of the Government—in that case, a federal court—had assisted in the enforcement of that agreement.[24] Thus *Hurd* v. *Hodge, supra,* did not present the question whether *purely* private discrimination, unaided by any action on the part of government, would violate § 1982 if its effect were to deny a citizen the right to rent or buy property solely because of his race or color.

The only federal court (other than the Court of Appeals in this case) that has ever squarely confronted that question held that a wholly private conspiracy among white citizens to prevent a Negro from leasing a farm violated § 1982. *United States* v. *Morris,* 125 F. 322. It is true that a dictum in *Hurd* said that § 1982 was directed only toward "governmental action," 334 U. S., at 31, but neither *Hurd* nor any other case

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[24] Compare *Harmon* v. *Tyler,* 273 U. S. 668, invalidating a New Orleans ordinance which gave legal force to private discrimination by forbidding any Negro to establish a home in a white community, or any white person to establish a home in a Negro community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected." See *Shelley* v. *Kraemer,* 334 U. S. 1, 12.

before or since has presented that precise issue for adjudication in this Court.[25] Today we face that issue for the first time.

III.

We begin with the language of the statute itself. In plain and unambiguous terms, § 1982 grants to all citizens, without regard to race or color, "the same right" to purchase and lease property "as is enjoyed by white citizens." As the Court of Appeals in this case evidently recognized, that right can be impaired as effec-

[25] Two of this Court's early opinions contain dicta to the general effect that § 1982 is limited to state action. *Virginia* v. *Rives*, 100 U. S. 313, 317–318; *Civil Rights Cases*, 109 U. S. 3, 16–17. But all that *Virginia* v. *Rives, supra*, actually *held* was that § 641 of the Revised Statutes of 1874 (derived from § 3 of the Civil Rights Act of 1866 and currently embodied in 28 U. S. C. § 1443 (1)) did not authorize the removal of a state prosecution where the defendants, without pointing to any statute discriminating against Negroes, could only assert that a denial of their rights might take place and might go uncorrected at trial. 100 U. S., at 319–322. See *Georgia* v. *Rachel*, 384 U. S. 780, 797–804. And of course the *Civil Rights Cases, supra*, which invalidated §§ 1 and 2 of the Civil Rights Act of 1875, 18 Stat. 335, did not involve the present statute at all.

It is true that a dictum in *Hurd* v. *Hodge*, 334 U. S. 24, 31, characterized *Corrigan* v. *Buckley*, 271 U. S. 323, as having "held" that "[t]he action toward which the provisions of the statute . . . [are] directed is governmental action." 334 U. S., at 31. But no such statement appears in the *Corrigan* opinion, and a careful examination of *Corrigan* reveals that it cannot be read as authority for the proposition attributed to it in *Hurd*. In *Corrigan*, suits had been brought to enjoin a threatened violation of certain restrictive covenants in the District of Columbia. The courts of the District had granted relief, see 55 App. D. C. 30, 299 F. 899, and the case reached this Court on appeal. As the opinion in *Corrigan* specifically recognized, no claim that the covenants could not validly be *enforced* against the appellants had been raised in the lower courts, and no such claim was properly before this Court. 271 U. S., at 330–331. The only question presented for decision was whether the restrictive covenants *themselves* violated the Fifth, Thirteenth, and Fourteenth Amendments, and §§ 1977, 1978, and 1979 of the Revised Statutes

tively by "those who place property on the market" [26] as by the State itself. For, even if the State and its agents lend no support to those who wish to exclude persons from their communities on racial grounds, the fact remains that, whenever property "is placed on the market for whites only, whites have a right denied to Negroes." [27] So long as a Negro citizen who wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy "the *same* right . . . as is enjoyed by white citizens . . . to . . . purchase [and] lease . . . real and personal property." 42 U. S. C. § 1982. (Emphasis added.)

On its face, therefore, § 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities. Indeed, even the respondents seem to concede that, if § 1982 "means what it says"—to use the words of the respondents' brief—then it must encompass every racially motivated refusal

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(now 42 U. S. C. §§ 1981, 1982, and 1983). *Ibid.* Addressing itself to that narrow question, the Court said that none of the provisions relied upon by the appellants prohibited private individuals from "enter[ing] into . . . [contracts] in respect to the control and disposition of their own property." *Id.*, at 331. Nor, added the Court, had the appellants even *claimed* that the provisions in question "had, in and of themselves, . . . [the] effect" of prohibiting such contracts. *Ibid.*

Even if *Corrigan* should be regarded as an adjudication that 42 U. S. C. § 1982 (then § 1978 of the Revised Statutes) does not prohibit private individuals from *agreeing* not to sell their property to Negroes, *Corrigan* would *not* settle the question whether § 1982 prohibits an *actual refusal to sell* to a Negro. Moreover, since the appellants in *Corrigan* had not even argued in this Court that the statute prohibited private agreements of the sort there involved, it would be a mistake to treat the *Corrigan* decision as a considered judgment even on that narrow issue.

[26] 379 F. 2d 33, 43.

[27] *Ibid.*

to sell or rent and cannot be confined to officially sanctioned segregation in housing. Stressing what they consider to be the revolutionary implications of so literal a reading of § 1982, the respondents argue that Congress cannot possibly have intended any such result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said.

IV.

In its original form, 42 U. S. C. § 1982 was part of § 1 of the Civil Rights Act of 1866.[28] That section was cast in sweeping terms:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[29]

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[28] Act of April 9, 1866, c. 31, § 1, 14 Stat. 27, re-enacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144, and codified in §§ 1977 and 1978 of the Revised Statutes of 1874, now 42 U. S. C. §§ 1981 and 1982. For the text of § 1981, see n. 78, *infra*.

[29] It is, of course, immaterial that § 1 ended with the words "any law, statute, ordinance, regulation, or custom, to the contrary not-

The crucial language for our purposes was that which guaranteed all citizens "the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens . . . ." To the Congress that passed the Civil Rights Act of 1866, it was clear that the right to do these things might be infringed not only by "State or local law" but also by "custom, or prejudice." [30] Thus, when Congress provided in § 1 of the Civil Rights Act that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citi-

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withstanding." The phrase was obviously inserted to qualify the reference to "like punishment, pains, and penalties, and to none other," thus emphasizing the supremacy of the 1866 statute over inconsistent state or local laws, if any. It was deleted, presumably as surplusage, in § 1978 of the Revised Statutes of 1874.

[30] Several weeks before the House began its debate on the Civil Rights Act of 1866, Congress had passed a bill (S. 60) to enlarge the powers of the Freedmen's Bureau (created by Act of March 3, 1865, c. 90, 13 Stat. 507) by extending military jurisdiction over certain areas in the South where, "in consequence of any State or local law, . . . *custom, or prejudice,* any of the civil rights . . . belonging to white persons (including the right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . .) are refused or denied to negroes . . . on account of race, color, or any previous condition of slavery or involuntary servitude . . . ." See Cong. Globe, 39th Cong., 1st Sess., 129, 209. (Emphasis added.) Both Houses had passed S. 60 (see *id.*, at 421, 688, 748, 775), and although the Senate had failed to override the President's veto (see *id.*, at 915–916, 943) the bill was nonetheless significant for its recognition that the "right to purchase" was a right that could be "refused or denied" by "custom or prejudice" as well as by "State or local law." See also the text accompanying nn. 49 and 59, *infra*. Of course an "abrogation of civil rights made 'in consequence of . . . custom, or prejudice' might as easily be perpetrated by private individuals or by unofficial community activity as by state officers armed with statute or ordinance." J. tenBroek, Equal Under Law 179 (1965 ed.).

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zens alike, it plainly meant to secure that right against interference from any source whatever, whether governmental or private.[31]

Indeed, if § 1 had been intended to grant nothing more than an immunity from *governmental* interference, then much of § 2 would have made no sense at all.[32] For that section, which provided fines and prison terms for certain

[31] When Congressman Bingham of Ohio spoke of the Civil Rights Act, he charged that it would duplicate the substantive scope of the bill recently vetoed by the President, see n. 30, *supra*, and that it would extend the territorial reach of that bill throughout the United States. Cong. Globe, 39th Cong., 1st Sess., 1292. Although the Civil Rights Act, as the dissent notes, *post*, at 457, 462, made no explicit reference to "prejudice," cf. n. 30, *supra*, the fact remains that nobody who rose to answer the Congressman disputed his basic premise that the Civil Rights Act of 1866 would prohibit every form of racial discrimination encompassed by the earlier bill the President had vetoed. Even Senator Trumbull of Illinois, author of the vetoed measure as well as of the Civil Rights Act, had previously remarked that the latter was designed to "extend to all parts of the country," on a permanent basis, the "equal civil rights" which were to have been secured in rebel territory by the former, *id.*, at 322, to the end that "*all* the badges of servitude . . . be abolished." *Id.*, at 323. (Emphasis added.)

[32] Section 2 provided:

"That any person who, *under color of any law, statute, ordinance, regulation, or custom,* shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court." (Emphasis added.)

For the evolution of this provision into 18 U. S. C. § 242, see *Screws* v. *United States*, 325 U. S. 91, 98–99; *United States* v. *Price*, 383 U. S. 787, 804.

individuals who deprived others of rights "secured or protected" by § 1, was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed.[33] There would, of course, have been no private violations to exempt if the only "right" granted by § 1

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[33] When Congressman Loan of Missouri asked the Chairman of the House Judiciary Committee, Mr. Wilson of Iowa, "why [does] the committee limit the provisions of the second section to those who act under the color of law," Cong. Globe, 39th Cong., 1st Sess., 1120, he was obviously inquiring why the second section did not also punish those who violated the first *without* acting "under the color of law." Specifically, he asked:

"Why not let them [the penalties of § 2] apply to the whole community where the acts are committed?" *Ibid.*

Mr. Wilson's reply was particularly revealing. If, as floor manager of the bill, he had viewed acts not under color of law as not violative of § 1 at all, that would of course have been the short answer to the Congressman's query. Instead, Mr. Wilson found it necessary to explain that the Judiciary Committee did not want to make "a general criminal code for the States." *Ibid.* Hence only those who discriminated "in reference to civil rights . . . under the color of . . . local laws" were made subject to the criminal sanctions of § 2. *Ibid.*

Congress might have thought it appropriate to confine criminal punishment to state officials, oath-bound to support the supreme federal law, while allowing only civil remedies—or perhaps only preventive relief—against private violators. Or Congress might have thought that States which did not authorize abridgment of the rights declared in § 1 would themselves punish all who interfered with those rights without official authority. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 1758, 1785. Cf. *Civil Rights Cases*, 109 U. S. 3, 19, 24–25.

Whatever the reason, it was repeatedly stressed that the only violations "reached *and punished*" by the bill, see Cong. Globe, 39th Cong., 1st Sess., at 1294 (emphasis added), would be those "done under color of State authority." *Ibid.* It is observed in dissent, *post*, at 458, that Senator Trumbull told Senator Cowan that § 2 was directed not at "State officers especially, but [at] everybody who violates the law." That remark, however, was nothing more than a reply to Senator Cowan's charge that § 2 was "exceedingly objectionable" in singling out state judicial officers for punishment for the first time "in the history of civilized legislation." *Id.*, at 500.

had been a right to be free of discrimination by public officials. Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that § 1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated "under color of law" were to be criminally punishable under § 2.

In attempting to demonstrate the contrary, the respondents rely heavily upon the fact that the Congress which approved the 1866 statute wished to eradicate the recently enacted Black Codes—laws which had saddled Negroes with "onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value . . . ." *Slaughter-House Cases*, 16 Wall. 36, 70.[34] The respondents suggest that the only evil Congress sought to eliminate was that of racially discriminatory laws in the former Confederate States. But the Civil Rights Act was drafted to apply throughout the country,[35] and its language was far

[34] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., at 39, 474, 516–517, 602-603, 1123-1125, 1151-1153, 1160. For the substance of the codes and their operation, see H. R. Exec. Doc. No. 118, 39th Cong., 1st Sess.; S. Exec. Doc. No. 6, 39th Cong., 2d Sess.; 1 W. Fleming, Documentary History of Reconstruction 273–312 (1906); E. McPherson, The Political History of the United States of America During the Period of Reconstruction 29–44 (1871); 2 S. Morison and H. Commager, The Growth of the American Republic 17–18 (1950 ed.); K. Stampp, The Era of Reconstruction 79–81 (1965).

[35] See n. 31, *supra*. It is true, as the dissent emphasizes, *post*, at 460, that Senator Trumbull remarked at one point that the Act "could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union," whose laws did not themselves discriminate against Negroes. Cong. Globe, 39th Cong., 1st Sess., 1761. But the Senator was simply observing that the Act would "in no manner [interfere] with the . . . regulations of any State which protects all alike in their rights of person and property." *Ibid.* See also *id.*, at 476, 505, 600. That is, the Act would have

broader than would have been necessary to strike down discriminatory statutes.

That broad language, we are asked to believe, was a mere slip of the legislative pen. We disagree. For the same Congress that wanted to do away with the Black Codes *also* had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation. "Accounts in newspapers North and South, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced" to show that "private outrage and atrocity" were "daily inflicted on freedmen . . . ." [36] The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers,[37] white planters who agreed among themselves not to hire freed slaves without the permission of their former masters,[38] white

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no effect upon nondiscriminatory legislation. Senator Trumbull obviously could *not* have meant that the law would apply to racial discrimination in some States but not in others, for the bill on its face applied upon its enactment "in every State and Territory in the United States," and no one disagreed when Congressman Bingham complained that, unlike Congress' recently vetoed attempt to expand the Freedmen's Bureau, see n. 30, *supra*, the Civil Rights Act would operate "in every State of the Union." *Id.*, at 1292. Nor, contrary to a suggestion made in dissent, *post*, at 460, was the Congressman speaking only of the Act's *potential* operation in any State that might enact a racially discriminatory law in the *future*. The Civil Rights Act, Congressman Bingham insisted, would "be enforced in every State . . . [at] the *present* . . . time." *Ibid.* (Emphasis added.)

[36] J. tenBroek, *supra*, n. 30, at 181. See also W. Brock, An American Crisis 124 (1963); J. McPherson, The Struggle For Equality 332 (1964); K. Stampp, *supra*, n. 34, at 75, 131–132.

[37] Cong. Globe, 39th Cong., 1st Sess., 95, 1833.

[38] *Id.*, at 1160.

citizens who assaulted Negroes [39] or who combined to drive them out of their communities.[40]

Indeed, one of the most comprehensive studies then before Congress stressed the prevalence of private hostility toward Negroes and the need to protect them from the resulting persecution and discrimination.[41] The report noted the existence of laws virtually prohibiting Negroes from owning or renting property in certain towns,[42] but described such laws as "mere isolated cases," representing "the local outcroppings of a spirit . . . found to prevail everywhere" [43]—a spirit expressed, for example,

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[39] *Id.*, at 339-340, 1160, 1835. It is true, as the dissent notes, *post*, at 462, that some of the references to private assaults occurred during debate on the Freedmen's Bureau bill, n. 30, *supra*, but the congressional discussion proceeded upon the understanding that all discriminatory conduct reached by the Freedmen's Bureau bill would be reached as well by the Civil Rights Act. See, *e. g.*, n. 31, *supra*.

[40] *Id.*, at 1835. It is clear that these instances of private mistreatment, see also text accompanying n. 41, *infra*, were understood as illustrative of the evils that the Civil Rights Act of 1866 would correct. Congressman Eldridge of Wisconsin, for example, said this:

"Gentlemen refer us to individual cases of wrong perpetrated upon the freedmen of the South as an argument why we should extend the Federal authority into the different States to control the action of the citizens thereof. But, I ask, has not the South submitted to the altered state of things there, to the late amendment of the Constitution, to the loss of their slave property, with a cheerfulness and grace that we did not expect? . . . I deprecate all these measures because of the implication they carry upon their face that the people who have heretofore owned slaves intend to do them wrong. I do not believe it. . . . The cases of ill-treatment are exceptional cases." *Id.*, at 1156.

So it was that "opponents denied or minimized the facts asserted" but "did not contend that the [Civil Rights Act] would not reach such facts if they did exist." J. tenBroek, *supra*, n. 30, at 181.

[41] Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess., 2, 17–25. See W. Brock, *supra*, n. 36, at 40–42; K. Stampp, *supra*, n. 34, at 73–75.

[42] Report of C. Schurz, *supra*, at 23–24.

[43] *Id.*, at 25.

by lawless acts of brutality directed against Negroes who traveled to areas where they were not wanted.[44] The report concluded that, even if anti-Negro legislation were "repealed in all the States lately in rebellion," equal treatment for the Negro would not yet be secured.[45]

In this setting, it would have been strange indeed if Congress had viewed its task as encompassing merely the nullification of racist laws in the former rebel States. That the Congress which assembled in the Nation's capital in December 1865 in fact had a broader vision of the task before it became clear early in the session, when three proposals to invalidate discriminatory state statutes were rejected as "too narrowly conceived."[46] From the outset it seemed clear, at least to Senator Trumbull of Illinois, Chairman of the Judiciary Committee, that stronger legislation might prove necessary. After Senator Wilson of Massachusetts had introduced his bill to strike down all racially discriminatory laws in the South,[47] Senator Trumbull said this:

> "I reported from the Judiciary Committee the second section of the [Thirteenth Amendment] for the very purpose of conferring upon Congress authority to see that the first section was carried out

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[44] *Id.*, at 18.

[45] *Id.*, at 35.

[46] J. tenBroek, *supra*, n. 30, at 177. One of the proposals, sponsored by Senator Wilson of Massachusetts, would have declared void all "laws, statutes, acts, ordinances, rules, and regulations" establishing or maintaining in former rebel States "any inequality of civil rights and immunities" on account of "color, race, or . . . a previous condition . . . of slavery." Cong. Globe, 39th Cong., 1st Sess., 39. The other two proposals, sponsored by Senator Sumner of Massachusetts, would have struck down in the former Confederate States "all laws . . . establishing any oligarchical privileges and any distinction of rights on account of color or race" and would have required that all persons there be "recognized as equal before the law." *Id.*, at 91.

[47] See n. 46, *supra*.

in good faith . . . and I hold that under that second section Congress will have the authority, when the constitutional amendment is adopted, *not only to pass the bill of the Senator from Massachusetts, but a bill that will be much more efficient to protect the freedman in his rights.* . . . And, sir, when the constitutional amendment shall have been adopted, if the information from the South be that the men whose liberties are secured by it are deprived of the privilege to go and come when they please, *to buy and sell when they please,* to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights: they would not be freemen without them. *It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights.* . . . [So] when the constitutional amendment is adopted I trust we may pass a bill, if the action of the people in the southern States should make it necessary, that will be *much more sweeping and efficient than the bill under consideration.*" [48]

[48] Cong. Globe, 39th Cong., 1st Sess., 43. (Emphasis added.) The dissent seeks to neutralize the impact of this quotation by noting that, prior to making the above statement, the Senator had argued that the second clause of the Thirteenth Amendment was inserted "for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." See *post,* at 455, 462–463. In fact, Senator Trumbull was simply replying at that point to the contention of Senator Saulsbury of Delaware that the second clause of the Thirteenth Amendment was never intended to authorize federal legislation interfering with subjects other than slavery itself. See *id.,* at 42. Senator Trumbull responded that the clause was intended to authorize *precisely* such legislation. That, "and none other," he said for emphasis, was its avowed purpose. But Senator Trumbull did *not* imply that the force of § 2 of the Thirteenth Amendment would be

Five days later, on December 18, 1865, the Secretary of State officially certified the ratification of the Thirteenth Amendment. The next day Senator Trumbull again rose to speak. He had decided, he said, that the "more sweeping and efficient" bill of which he had spoken previously ought to be enacted

> "at an early day for the purpose of quieting apprehensions in the minds of many friends of freedom lest by local legislation *or a prevailing public sentiment* in some of the States persons of the African race should continue to be oppressed and in fact deprived of their freedom . . . ."[49]

On January 5, 1866, Senator Trumbull introduced the bill he had in mind—the bill which later became the Civil Rights Act of 1866.[50] He described its objectives in terms that belie any attempt to read it narrowly:

> "Mr. President, I regard the bill to which the attention of the Senate is now called as the most important measure that has been under its consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be

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spent once Congress had nullified discriminatory state laws. On the contrary, he emphasized the fact that it was "for Congress to determine, and nobody else," what sort of legislation might be "appropriate" to make the Thirteenth Amendment effective. *Id.*, at 43. Cf. Part V of this opinion, *infra*.

[49] *Id.*, at 77. (Emphasis added.)

[50] *Id.*, at 129.

> affected by them have some means of availing themselves of their benefits." [51]

Of course, Senator Trumbull's bill would, as he pointed out, "destroy all [the] discriminations" embodied in the Black Codes,[52] but it would do more: It would affirmatively secure for all men, whatever their race or color, what the Senator called the "great fundamental rights":

> "the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property." [53]

As to those basic civil rights, the Senator said, the bill would "break down *all* discrimination between black men and white men." [54]

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[51] *Id.*, at 474.

[52] *Ibid.* See the dissenting opinion, *post*, at 458.

[53] *Id.*, at 475.

[54] *Id.*, at 599. (Emphasis added.) Senator Trumbull later observed that his bill would add nothing to federal authority if the States would fully "perform their constitutional obligations." *Id.*, at 600. See also Senator Trumbull's remarks, *id.*, at 1758; the remarks of Senator Lane of Indiana, *id.*, at 602–603; and the remarks of Congressman Wilson of Iowa, *id.*, at 1117–1118. But it would be a serious mistake to infer from such statements any notion (see the dissenting opinion, *post*, at 460) that, so long as the States refrained from actively discriminating against Negroes, their "obligations" in this area, as Senator Trumbull and others understood them, would have been fulfilled. For the Senator's concern, it will be recalled (see text accompanying n. 49, *supra*), was that Negroes might be "oppressed and in fact deprived of their freedom" not only by hostile laws but also by "prevailing public sentiment," and he viewed his bill as necessary "unless by local legislation they [the States] provide for the real freedom of their former slaves." *Id.*, at 77. See also *id.*, at 43. And see the remarks of Congressman Lawrence of Ohio:

"Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by

That the bill would indeed have so sweeping an effect was seen as its great virtue by its friends [55] and as its great danger by its enemies [56] but was disputed by none. Opponents of the bill charged that it would not only regulate state laws but would directly "determine the persons who [would] enjoy . . . property within the States," [57] threatening the ability of white citizens "to determine who [would] be members of [their] communit[ies] . . . ." [58] The bill's advocates did not deny the accuracy of those characterizations. Instead, they defended the propriety of employing federal authority to deal with "the white man . . . [who] would invoke the power of local prejudice" against the Negro.[59] Thus, when the Senate passed the Civil Rights Act on February 2, 1866,[60] it did so fully aware of the breadth of the measure it had approved.

In the House, as in the Senate, much was said about eliminating the infamous Black Codes.[61] But, like the Senate, the House was moved by a larger objective—that of giving real content to the freedom guaranteed by the Thirteenth Amendment. Representative Thayer of Pennsylvania put it this way:

> "[W]hen I voted for the amendment to abolish slavery . . . I did not suppose that I was offer-

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prohibitory laws, or by a failure to protect any one of them." *Id.*, at 1833.

[55] See, *e. g.*, the remarks of Senator Howard of Michigan. *Id.*, at 504.

[56] See, *e. g.*, the remarks of Senator Cowan of Pennsylvania, *id.*, at 500, and the remarks of Senator Hendricks of Indiana. *Id.*, at 601.

[57] Senator Saulsbury of Delaware. *Id.*, at 478.

[58] Senator Van Winkle of West Virginia. *Id.*, at 498.

[59] Senator Lane of Indiana. *Id.*, at 603.

[60] *Id.*, at 606–607.

[61] See, *e. g.*, *id.*, *at* 1118–1119, 1123–1125, 1151–1153, 1160. See generally the discussion in the dissenting opinion, *post*, at 464–467.

> ing . . . a mere paper guarantee. And when I voted for the second section of the amendment, I felt . . . certain that I had . . . given to Congress ability to protect . . . the rights which the first section gave . . . ."
>
> "The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of that great measure. It is to give to it practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country. . . . The events of the last four years . . . have changed [a] large class of people . . . from a condition of slavery to that of freedom. *The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty* given to them by the American people." [62]

Representative Cook of Illinois thought that, without appropriate federal legislation, any "combination of men in [a] neighborhood [could] prevent [a Negro] from having any chance" to enjoy those benefits.[63] To Congressman Cook and others like him, it seemed evident that, with respect to basic civil rights—including the "right to . . . purchase, lease, sell, hold, and convey . . . property," Congress must provide that "there . . . be *no* discrimination" on grounds of race or color.[64]

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[62] *Id.*, at 1151. (Emphasis added.)

[63] *Id.*, at 1124.

[64] *Ibid.* (Emphasis added.) The clear import of these remarks is in no way diminished by the heated debate, see *id.*, at 1290–1294, portions of which are quoted in the dissenting opinion, *post*, at 467–468, between Representative Bingham, opposing the bill, and Representative Shellabarger, supporting it, over the question of what *kinds* of state laws might be invalidated by § 1, a question not involved in this case.

It thus appears that, when the House passed the Civil Rights Act on March 13, 1866,[65] it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act.

President Andrew Johnson vetoed the Act on March 27,[66] and in the brief congressional debate that followed, his supporters characterized its reach in all-embracing terms. One stressed the fact that § 1 would confer "the right . . . to purchase . . . real estate . . . without any qualification and without any restriction whatever . . . ." [67] Another predicted, as a corollary, that the Act would preclude preferential treatment for white persons in the rental of hotel rooms and in the sale of church pews.[68] Those observations elicited no reply. On April 6 the Senate, and on April 9 the House, overrode the President's veto by the requisite majorities,[69] and the Civil Rights Act of 1866 became law.[70]

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[65] *Id.*, at 1367. On March 15, the Senate concurred in the several technical amendments that had been made by the House. *Id.*, at 1413–1416.

[66] *Id.*, at 1679–1681.

[67] Senator Cowan of Pennsylvania. *Id.*, at 1781.

[68] Senator Davis of Kentucky. *Id.*, Appendix, at 183. Such expansive views of the Act's reach found frequent and unchallenged expression in the Nation's press. See, *e. g.*, Daily National Intelligencer (Washington, D. C.), March 24, 1866, p. 2, col. 1; New York Herald, March 29, 1866, p. 4, col. 3; Cincinnati Commercial, March 30, 1866, p. 4, col. 2; Evening Post (New York), April 7, 1866, p. 2, col. 1; Indianapolis Daily Herald, April 17, 1866, p. 2, col. 1.

[69] Cong. Globe, 39th Cong., 1st Sess., 1809, 1861.

[70] "Never before had Congress over-ridden a President on a major political issue, and there was special gratification in feeling that this had not been done to carry some matter of material interest, such as a tariff, but in the cause of disinterested justice." W. Brock, *supra*, n. 36, at 115.

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.

Nor was the scope of the 1866 Act altered when it was re-enacted in 1870, some two years after the ratification of the Fourteenth Amendment.[71] It is quite true that some members of Congress supported the Fourteenth Amendment "in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States." *Hurd* v. *Hodge,* 334 U. S. 24, 32–33. But it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were meant somehow to *limit* its application to state action. The legislative history furnishes not the slightest factual basis for any such speculation, and the conditions prevailing in 1870 make it highly implausible. For by that time most, if not all, of the former Confederate States, then under the control of "reconstructed" legislatures, had formally repudiated racial discrimination, and the focus of congressional concern had clearly shifted from hostile statutes to the activities of groups like the Ku Klux Klan, operating wholly outside the law.[72]

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[71] Section 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 144:

"*And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted . . . ."

[72] See *United States* v. *Mosley,* 238 U. S. 383, 387–388; *United States* v. *Price,* 383 U. S. 787, 804–805; 2 W. Fleming, Documentary History of Reconstruction 285–288 (1907); K. Stampp, *supra,* n. 34, at 145, 171, 185, 198–204; G. Stephenson, Race Distinctions in American Law 116 (1910).

Against this background, it would obviously make no sense to assume, without any historical support whatever, that Congress made a silent decision in 1870 to exempt private discrimination from the operation of the Civil Rights Act of 1866.[73] "The cardinal rule is that repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U. S. 497, 503. All Congress said in 1870 was that the 1866 law "is hereby re-enacted." That is all Congress meant.

As we said in a somewhat different setting two Terms ago, "We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language." *United States* v. *Price*, 383 U. S. 787, 801. "We are not at liberty to seek ingenious analytical instruments," *ibid.*, to carve from § 1982 an exception for private conduct—even though its application to such conduct in the present context is without established precedent. And, as the Attorney General of the United States said at the oral argument of this case, "The fact that the statute lay partially dormant for many years cannot be held to diminish its force today."

V.

The remaining question is whether Congress has power under the Constitution to do what § 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property. Our starting point is the Thirteenth Amendment, for it was pursuant

[73] The Court of Appeals in this case seems to have derived such an assumption from language in *Virginia* v. *Rives*, 100 U. S. 313, 317–318, and *Hurd* v. *Hodge*, 334 U. S. 24, 31. See 379 F. 2d 33, 39–40, 43. Both of those opinions simply asserted that, at least after its re-enactment in 1870, the Civil Rights Act of 1866 was directed only at governmental action. Neither opinion explained why that was thought to be so, and in each case the statement was merely dictum. See n. 25, *supra*.

to that constitutional provision that Congress originally enacted what is now § 1982. The Amendment consists of two parts. Section 1 states:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Section 2 provides:

> "Congress shall have power to enforce this article by appropriate legislation."

As its text reveals, the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U. S. 3, 20. It has never been doubted, therefore, "that the power vested in Congress to enforce the article by appropriate legislation," *ibid.*, includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." *Id.*, at 23.[74]

Thus, the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective

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[74] So it was, for example, that this Court unanimously upheld the power of Congress under the Thirteenth Amendment to make it a crime for one individual to compel another to work in order to discharge a debt. *Clyatt* v. *United States*, 197 U. S. 207.

can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals. The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment "by appropriate legislation" include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." *Civil Rights Cases,* 109 U. S. 3, 20. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*" *Ibid.* (Emphasis added.)

Those who opposed passage of the Civil Rights Act of 1866 argued in effect that the Thirteenth Amendment merely authorized Congress to dissolve the legal bond by which the Negro slave was held to his master.[75] Yet many had earlier opposed the Thirteenth Amendment on the very ground that it would give Congress virtually unlimited power to enact laws for the protection of Negroes in every State.[76] And the majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation that

[75] See, *e. g.,* Cong. Globe, 39th Cong., 1st Sess., 113, 318, 476, 499, 507, 576, 600–601.

[76] See, *e. g.,* Cong. Globe, 38th Cong., 1st Sess., 1366, 2616, 2940–2941, 2962, 2986; Cong. Globe, 38th Cong., 2d Sess., 178–180, 182, 192, 195, 239, 241–242, 480–481, 529.

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was embodied in the 1866 Civil Rights Act. Their chief spokesman, Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, had brought the Thirteenth Amendment to the floor of the Senate in 1864. In defending the constitutionality of the 1866 Act, he argued that, if the narrower construction of the Enabling Clause were correct, then

> "the trumpet of freedom that we have been blowing throughout the land has given an 'uncertain sound,' and the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the amendment itself. . . . I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end." [77]

Surely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational

[77] Cong. Globe, 39th Cong., 1st Sess., 322. See also the remarks of Senator Howard of Michigan. *Id.*, at 503.

one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Civil Rights Cases*, 109 U. S. 3, 22.[78] Just as the Black Codes, enacted after the Civil

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[78] The Court did conclude in the *Civil Rights Cases* that "the act of . . . the owner of the inn, the public conveyance or place of amusement, refusing . . . accommodation" cannot be "justly regarded as imposing any badge of slavery or servitude upon the applicant." 109 U. S., at 24. "It would be running the slavery argument into the ground," the Court thought, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business." *Id.*, at 24–25. Mr. Justice Harlan dissented, expressing the view that "such discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment." *Id.*, at 43.

Whatever the present validity of the position taken by the majority on that issue—a question rendered largely academic by Title II of the Civil Rights Act of 1964, 78 Stat. 243 (see *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241; *Katzenbach* v. *McClung*, 379 U. S. 294)—we note that the entire Court agreed upon at least one proposition: The Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." 109 U. S., at 22. Cf. *id.*, at 35 (dissenting opinion).

In *Hodges* v. *United States*, 203 U. S. 1, a group of white men had terrorized several Negroes to prevent them from working in a

War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men

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sawmill. The terrorizers were convicted under 18 U. S. C. § 241 (then Revised Statutes § 5508) of conspiring to prevent the Negroes from exercising the right to contract for employment, a right secured by 42 U. S. C. § 1981 (then Revised Statutes § 1977, derived from § 1 of the Civil Rights Act of 1866, see n. 28, *supra*). Section 1981 provides, in terms that closely parallel those of § 1982 (then Revised Statutes § 1978), that all persons in the United States "shall have *the same right . . . to make and enforce contracts,* to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." (Emphasis added.)

This Court reversed the conviction. The majority recognized that "one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts." 203 U. S., at 17. And there was no doubt that the defendants had deprived their Negro victims, on racial grounds, of the opportunity to dispose of their labor by contract. Yet the majority said that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery," *id.*, at 18, and asserted that only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment. Contra, *United States* v. *Cruikshank*, 25 Fed. Cas. 707, 712 (No. 14,897) (dictum of Mr. Justice Bradley, on circuit), aff'd, 92 U. S. 542; *United States* v. *Morris*, 125 F. 322, 324, 330–331. Mr. Justice Harlan, joined by Mr. Justice Day, dissented. In their view, the interpretation the majority placed upon the Thirteenth Amendment was "entirely too narrow and . . . hostile to the freedom established by the supreme law of the land." 203 U. S., at 37. That interpretation went far, they thought, "towards neutralizing many declarations made as to the object of the recent Amendments of the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom." *Ibid.*

The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irrecon-

into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" [79] and to "buy and sell when they please" [80]—would be left with "a mere paper guarantee" [81] if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

Representative Wilson of Iowa was the floor manager in the House for the Civil Rights Act of 1866. In urging that Congress had ample authority to pass the pending bill, he recalled the celebrated words of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." [82]

"The end is legitimate," the Congressman said, "because it is defined by the Constitution itself. The end is the

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cilable with the position taken by every member of this Court in the *Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled.

[79] See text accompanying n. 48, *supra*.

[80] *Ibid.*

[81] See text accompanying n. 62, *supra*.

[82] Cong. Globe, 39th Cong., 1st Sess., 1118.

maintenance of freedom . . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. . . . This settles the appropriateness of this measure, and that settles its constitutionality." [83]

We agree. The judgment is

Reversed.

MR. JUSTICE DOUGLAS, concurring.

The Act of April 9, 1866, 14 Stat. 27, 42 U. S .C. § 1982, provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Act was passed to enforce the Thirteenth Amendment which in § 1 abolished "slavery" and "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted" and in § 2 gave Congress power "to enforce this article by appropriate legislation."

Enabling a Negro to buy and sell real and personal property is a removal of one of many badges of slavery.

> "Slaves were not considered men. . . . They could own nothing; they could make no contracts; they could hold no property, nor traffic in property; they could not hire out; they could not legally marry nor constitute families; they could not control their children; they could not appeal from their master; they could be punished at will." W. Dubois, Black Reconstruction in America 10 (1964).[1]

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[83] *Ibid.*

[1] The cases are collected in five volumes in H. Catterall, Judicial Cases Concerning American Slavery and the Negro (1926–1937). And see 1 T. Cobb, An Inquiry into the Law of Negro Slavery, c. XIV (1858); G. Ostrander, The Rights of Man in America 1606–1861, p. 252 (1960); G. Stroud, Sketch of the Laws Relating to Slavery 45–50 (1827); J. Wheeler, Law of Slavery 190–191 (1837).

The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock—to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.

Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting, *e. g., Lane* v. *Wilson,* 307 U. S. 268. Negroes have been excluded over and again from juries solely on account of their race, *e. g., Strauder* v. *West Virginia,* 100 U. S. 303, or have been forced to sit in segregated seats in courtrooms, *Johnson* v. *Virginia,* 373 U. S. 61. They have been made to attend segregated and inferior schools, *e. g., Brown* v. *Board of Education,* 347 U. S. 483, or been denied entrance to colleges or graduate schools because of their color, *e. g., Pennsylvania* v. *Board of Trusts,* 353 U. S. 230; *Sweatt* v. *Painter,* 339 U. S. 629. Negroes have been prosecuted for marrying whites, *e. g., Loving* v. *Virginia,* 388 U. S. 1. They have been forced to live in segregated residential districts, *Buchanan* v. *Warley,* 245 U. S. 60, and residents of white neighborhoods have denied them entrance, *e. g., Shelley* v. *Kraemer,* 334 U. S. 1. Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches, *Plessy* v. *Ferguson,* 163 U. S. 537; public parks, *New Orleans Park Improvement Assn.* v. *Detiege,* 358 U. S. 54; restaurants, *Lombard* v. *Louisiana,* 373 U. S. 267; public beaches, *Mayor of Baltimore* v. *Dawson,* 350 U. S. 877; municipal

golf courses, *Holmes* v. *City of Atlanta*, 350 U. S. 879; amusement parks, *Griffin* v. *Maryland*, 378 U. S. 130; buses, *Gayle* v. *Browder*, 352 U. S. 903; public libraries, *Brown* v. *Louisiana*, 383 U. S. 131. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton." *Hamilton* v. *Alabama*, 376 U. S. 650.

That brief sampling of discriminatory practices, many of which continue today, stands almost as an annotation to what Frederick Douglass (1817–1895) wrote nearly a century earlier:

> "Of all the races and varieties of men which have suffered from this feeling, the colored people of this country have endured most. They can resort to no disguises which will enable them to escape its deadly aim. They carry in front the evidence which marks them for persecution. They stand at the extreme point of difference from the Caucasian race, and their African origin can be instantly recognized, though they may be several removes from the typical African race. They may remonstrate like Shylock—'Hath not a Jew eyes? hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same summer and winter, as a Christian is?'—but such eloquence is unavailing. They are Negroes—and that is enough, in the eye of this unreasoning prejudice, to justify indignity and violence. In nearly every department of American life they are confronted by this insidious influence. It fills the air. It meets them at the workshop and factory, when they apply for work. It meets them at the church, at the hotel, at the

> ballot-box, and worst of all, it meets them in the jury-box. Without crime or offense against law or gospel, the colored man is the Jean Valjean of American society. He has escaped from the galleys, and hence all presumptions are against him. The workshop denies him work, and the inn denies him shelter; the ballot-box a fair vote, and the jury-box a fair trial. He has ceased to be the slave of an individual, but has in some sense become the slave of society. He may not now be bought and sold like a beast in the market, but he is the trammeled victim of a prejudice, well calculated to repress his manly ambition, paralyze his energies, and make him a dejected and spiritless man, if not a sullen enemy to society, fit to prey upon life and property and to make trouble generally." [2]

Today the black is protected by a host of civil rights laws. But the forces of discrimination are still strong.

A member of his race, duly elected by the people to a state legislature, is barred from that assembly because of his views on the Vietnam war. *Bond* v. *Floyd*, 385 U. S. 116.

Real estate agents use artifice to avoid selling "white property" to the blacks.[3] The blacks who travel the country, though entitled by law to the facilities for sleeping and dining that are offered all tourists, *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241, may well learn that the "vacancy" sign does not mean what it says, especially if the motel has a swimming pool.

On entering a half-empty restaurant they may find "reserved" signs on all unoccupied tables.

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[2] Excerpt from Frederick Douglass, The Color Line, The North American Review, June 1881, 4 The Life and Writings of Frederick Douglass 343–344 (1955).

[3] See *Kamper* v. *Department of State of New York*, 22 N. Y. 2d 690, 238 N. E. 2d 914.

The black is often barred from a labor union because of his race.[4]

He learns that the order directing admission of his children into white schools has not been obeyed "with all deliberate speed," *Brown* v. *Board of Education*, 349 U. S. 294, 301, but has been delayed by numerous stratagems and devices.[5] State laws, at times, have even en-

[4] See, *e. g.*, O'Hanlon, The Case Against the Unions, Fortune, Jan. 1968, at 170.

[5] The contrivances which some States have concocted to thwart the command of our decision in *Brown* v. *Board of Education* are by now legendary. See, *e. g.*, *Monroe* v. *Board of Commissioners*, 391 U. S. 450 (Tennessee "free-transfer" plan); *Green* v. *County School Board*, 391 U. S. 430 (Virginia school board "freedom-of-choice" plan); *Raney* v. *Board of Education*, 391 U. S. 443 (Arkansas "freedom-of-choice" plan); *Bradley* v. *School Board*, 382 U. S. 103 (allocation of faculty allegedly on a racial basis); *Griffin* v. *School Board*, 377 U. S. 218 (closing of public schools in Prince Edward County, Virginia, with tuition grants and tax concessions used to assist white children attending private segregated schools); *Goss* v. *Board of Education*, 373 U. S. 683 (Tennessee rezoning of school districts, with a transfer plan permitting transfer by students on the basis of race); *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, aff'd *en banc*, 380 F. 2d 385 (C. A. 5th Cir. 1967) ("freedom-of-choice" plans in States within the jurisdiction of the United States Court of Appeals for the Fifth Circuit); *Northcross* v. *Board of Education*, 302 F. 2d 818 (C. A. 6th Cir. 1962) (Tennessee pupil-assignment law); *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (C. A. 5th Cir. 1957) (Louisiana pupil-assignment law); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (D. C. E. D. La. 1961), aff'd, 368 U. S. 515 (Louisiana law permitting closing of public schools, with extensive state aid going to private segregated schools); *Holmes* v. *Danner*, 191 F. Supp. 394 (D. C. M. D. Ga. 1961) (Georgia statute cutting off state funds if Negroes admitted to state university); *Aaron* v. *McKinley*, 173 F. Supp. 944 (D. C. E. D. Ark. 1959), aff'd *sub nom. Faubus* v. *Aaron*, 361 U. S. 197 (Arkansas statute cutting off state funds to integrated school districts); *James* v. *Almond*, 170 F. Supp. 331 (D. C. E. D. Va. 1959) (closing of all integrated public schools). See also *Rogers* v. *Paul*, 382 U. S. 198; *Calhoun* v. *Latimer*, 377 U. S. 263; *Cooper* v. *Aaron*, 358 U. S. 1.

couraged discrimination in housing. *Reitman* v. *Mulkey*, 387 U. S. 369.

This recital is enough to show how prejudices, once part and parcel of slavery, still persist. The men who sat in Congress in 1866 were trying to remove some of the badges or "customs" [6] of slavery when they enacted § 1982. And, as my Brother STEWART shows, the Congress that passed the so-called Open Housing Act in 1968 did not undercut any of the grounds on which § 1982 rests.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITE joins, dissenting.

The decision in this case appears to me to be most ill-considered and ill-advised.

The petitioners argue that the respondents' racially motivated refusal to sell them a house entitles them to judicial relief on two separate grounds. First, they claim that the respondents acted in violation of 42 U. S. C. § 1982; second, they assert that the respondents' conduct amounted in the circumstances to "state action" [1] and was therefore forbidden by the Fourteenth Amendment even in the absence of any statute. The Court, without

[6] My Brother HARLAN's listing of some of the "customs" prevailing in the North at the time § 1982 was first enacted shows the extent of organized white discrimination against newly freed blacks. As he states, "[r]esidential segregation was the prevailing pattern almost everywhere in the North." *Post*, at 474–475. Certainly, then, it was "customary." To suggest, however, that there might be room for argument in this case (*post*, at 475, n. 65) that the discrimination against petitioners was not in some measure a part and product of this longstanding and widespread customary pattern is to pervert the problem by allowing the legal mind to draw lines and make distinctions that have no place in the jurisprudence of a nation striving to rejoin the human race.

[1] This "state action" argument emphasizes the respondents' role as housing developers exercising continuing authority over a suburban housing complex with about 1,000 inhabitants.

reaching the second ground alleged, holds that the petitioners are entitled to relief under 42 U. S. C. § 1982, and that § 1982 is constitutional as legislation appropriate to enforce the Thirteenth Amendment.

For reasons which follow, I believe that the Court's construction of § 1982 as applying to purely private action is almost surely wrong, and at the least is open to serious doubt. The issues of the constitutionality of § 1982, as construed by the Court, and of liability under the Fourteenth Amendment alone, also present formidable difficulties. Moreover, the political processes of our own era have, since the date of oral argument in this case, given birth to a civil rights statute [2] embodying "fair housing" provisions [3] which would at the end of this year make available to others, though apparently not to the petitioners themselves,[4] the type of relief which the petitioners now seek. It seems to me that this latter factor so diminishes the public importance of this case that by far the wisest course would be for this Court to refrain from decision and to dismiss the writ as improvidently granted.

I.

I shall deal first with the Court's construction of § 1982, which lies at the heart of its opinion. That construction is that the statute applies to purely private as well as to state-authorized discrimination.

A.

The Court's opinion focuses upon the statute's legislative history, but it is worthy of note that the precedents in this Court are distinctly opposed to the Court's view of the statute.

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[2] The Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73.

[3] *Id.*, §§ 801–819.

[4] See *ante*, at 417, n. 21.

In the *Civil Rights Cases*, 109 U. S. 3, decided less than two decades after the enactment of the Civil Rights Act of 1866, from which § 1982 is derived, the Court said in dictum of the 1866 Act:

> "This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. . . . The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a State law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence." *Id.*, at 16–17.[5]

In *Corrigan* v. *Buckley*, 271 U. S. 323, the question was whether the courts of the District of Columbia might enjoin prospective breaches of racially restrictive covenants. The Court held that it was without jurisdiction to consider the petitioners' argument that the covenant was void because it contravened the Fifth, Thirteenth, and Fourteenth Amendments and their implementing statutes. The Court reasoned, *inter alia*, that the statutes, including the immediate predecessor of § 1982,[6] were inapplicable because

> "they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into

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[5] See also *Virginia* v. *Rives*, 100 U. S. 313, 317–318.

[6] Section 1978 of the Revised Statutes.

> by private individuals in respect to the control and disposition of their own property." *Id.*, at 331.[7]

In *Hurd* v. *Hodge*, 334 U. S. 24, the issue was again whether the courts of the District might enforce racially restrictive covenants. At the outset of the process of reasoning by which it held that judicial enforcement of such a covenant would violate the predecessor of § 1982, the Court said:

> "We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is [*sic*] directed is governmental action. Such was the holding of *Corrigan* v. *Buckley* . . . ." *Id.*, at 31.[8]

B.

Like the Court, I begin analysis of § 1982 by examining its language. In its present form, the section provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The Court finds it "plain and unambiguous," *ante*, at 420, that this language forbids purely private as well as state-authorized discrimination. With all respect, I do not find it so. For me, there is an inherent ambiguity in the

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[7] See also *Buchanan* v. *Warley*, 245 U. S. 60, 78–79.

[8] It seems to me that this passage is not dictum, as the Court terms it, *ante*, at 419 and n. 25, but a holding. For if the Court had held the covenants in question invalid as between the parties, then it would not have had to rely upon a finding of "state action."

term "right," as used in § 1982. The "right" referred to may either be a right to equal status under the law, in which case the statute operates only against state-sanctioned discrimination, or it may be an "absolute" right enforceable against private individuals. To me, the words of the statute, taken alone, suggest the former interpretation, not the latter.[9]

Further, since intervening revisions have not been meant to alter substance, the intended meaning of § 1982 must be drawn from the words in which it was originally enacted. Section 1982 originally was a part of § 1 of the Civil Rights Act of 1866, 14 Stat. 27. Sections 1 and 2 of that Act provided in relevant part:

> "That all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . , shall have the same right, in every State and Territory

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[9] Despite the Court's view that this reading flies in the face of the "plain and unambiguous terms" of the statute, see *ante*, at 420, it is not without precedent. In the *Civil Rights Cases*, 109 U. S. 3, the Court said of identical language in the predecessor statute to § 1982:

"[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority . . . . The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true . . . ; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right . . . to hold property, to buy and sell . . . ; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; . . . but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right . . . ." 109 U. S., at 17.

in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

"Sec. 2. That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . shall be deemed guilty of a misdemeanor . . . ."

It seems to me that this original wording indicates even more strongly than the present language that § 1 of the Act (as well as § 2, which is explicitly so limited) was intended to apply only to action taken pursuant to state or community authority, in the form of a "law, statute, ordinance, regulation, or custom." [10] And with deference I suggest that the language of § 2, taken alone, no more implies that § 2 "was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed," see *ante*, at 425, than it does that § 2 was carefully drafted to enforce all of the rights secured by § 1.

C.

The Court rests its opinion chiefly upon the legislative history of the Civil Rights Act of 1866. I shall endeavor to show that those debates do not, as the Court would have it, overwhelmingly support the result reached by the Court, and in fact that a contrary conclusion may equally well be drawn. I shall consider the legislative

[10] The Court does not claim that the deletion from § 1 of the statute, in 1874, of the words "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding" was intended to have any substantive effect. See *ante*, at 422, n. 29.

history largely in chronological sequence, dealing separately with the Senate and House debates.

The First Session of the Thirty-ninth Congress met on December 4, 1865, some six months after the preceding Congress had sent to the States the Thirteenth Amendment, and a few days before word was received of that Amendment's ratification. On December 13, Senator Wilson introduced a bill which would have invalidated all laws in the former rebel States which discriminated among persons as to civil rights on the basis of color, and which would have made it a misdemeanor to enact or enforce such a statute.[11] On the same day, Senator Trumbull said with regard to Senator Wilson's proposal:

> "The bill does not go far enough, if what we have been told to-day in regard to the treatment of freedmen in the southern States is true. . . . [U]ntil [the Thirteenth Amendment] is adopted there may be some question . . . as to the authority of Congress to pass such a bill as this, but after the adoption of the constitutional amendment there can be none.
>
> "The second clause of that amendment was inserted for some purpose, and I would like to know . . . for what purpose? Sir, for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." [12]

Senator Trumbull then indicated that he would introduce separate bills to enlarge the powers of the recently founded Freedmen's Bureau and to secure the freedmen in their civil rights, both bills in his view being authorized by the second clause of the Thirteenth Amendment.[13]

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[11] See Cong. Globe, 39th Cong., 1st Sess., 39–42.

[12] *Id.*, at 43.

[13] See *ibid.*

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Since he had just stated that the purpose of that clause was to enable Congress to nullify acts of the state legislatures, it seems inferable that this was also to be the aim of the promised bills.

On January 5, Senator Trumbull introduced both the Freedmen's bill and the civil rights bill.[14] The Freedmen's bill would have strengthened greatly the existing system by which agents of the Freedmen's Bureau exercised protective supervision over freedmen wherever they were present in large numbers. *Inter alia,* the Freedmen's bill would have permitted the President, acting through the Bureau, to extend "military protection and jurisdiction" over all cases in which persons in the former rebel States were

> "in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, [denied or refused] any of the civil rights or immunities belonging to white persons, including the right . . . to inherit, purchase, lease, sell, hold and convey real and personal property, . . . on account of race . . . ." [15]

The next section of the Freedmen's bill provided that the agents of the Freedmen's Bureau might try and convict of a misdemeanor any person who deprived another of such rights on account of race and "under color of any State or local law, ordinance, police, or other regulation or custom . . . ." Thus, the Freedmen's bill, which was generally limited in its application to the Southern States and which was correspondingly more sweeping in its pro-

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[14] See Cong. Globe, 39th Cong., 1st Sess., 129.

[15] Freedmen's bill, § 7. The text of the bill may be found in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 72 (1871). The Freedmen's bill was passed by both the Senate and the House, but the Senate failed to override the President's veto. See Cong. Globe, 39th Cong., 1st Sess., 421, 688, 742, 748, 775, 915–916, 943.

tection of the freedmen than the civil rights bill,[16] defined both the rights secured and the denials of those rights which were criminally punishable in terms of acts done under the aegis of a State or locality. The only significant distinction was that denials which occurred "in consequence of a State or local . . . prejudice" would have entitled the victim to military protection but would not have been criminal. In the corresponding section of the companion and generally parallel civil rights bill, which was to be effective throughout the Nation, the reference to "prejudice" was omitted from the rights-defining section. This would seem to imply that the more widely applicable civil rights bill was meant to provide protection only against those discriminations which were legitimated by a state or community sanction sufficiently powerful to deserve the name "custom."

The form of the Freedmen's bill also undercuts the Court's argument, *ante*, at 424, that if § 1 of the Civil Rights Act were construed as extending only to "state action," then "much of § 2 [which clearly was so limited] would have made no sense at all." For the similar structure of the companion Freedmen's bill, drafted by the same hand and largely parallel in structure, would seem to confirm that the limitation to "state action" was deliberate.

The civil rights bill was debated intermittently in the Senate from January 12, 1866, until its eventual

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[16] Section 7 of the Freedmen's bill would have permitted the President to extend "military protection and jurisdiction" over all cases in which the specified rights were denied, while § 3 of the Civil Rights Act merely gave the federal courts concurrent jurisdiction over such actions. Section 8 of the Freedmen's bill would have allowed agents of the Freedmen's Bureau to try and convict those who violated the bill's criminal provisions, while § 3 of the Civil Rights Act only gave the federal courts exclusive jurisdiction over such actions.

passage over the President's veto on April 6. In the course of the debates, Senator Trumbull, who was by far the leading spokesman for the bill, made a number of statements which can only be taken to mean that the bill was aimed at "state action" alone. For example, on January 29, 1866, Senator Trumbull began by citing a number of recently enacted Southern laws depriving men of rights named in the bill. He stated that "[t]he purpose of the bill under consideration is to destroy *all these discriminations,* and carry into effect the constitutional amendment." [17] Later the same day, Senator Trumbull quoted § 2 of the bill in full, and said:

> "This is the valuable section of the bill so far as protecting the rights of freedmen is concerned. . . . When it comes to be understood in all parts of the United States that *any person* who shall deprive another of *any right* . . . in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease." [18]

These words contain no hint that the "rights" protected by § 2 were intended to be any less broad than those secured by § 1. Of course, § 2 plainly extended only to "state action." That Senator Trumbull viewed §§ 1 and 2 as co-extensive appears even more clearly from his answer the following day when asked by Senator Cowan whether there was "not a provision [in the bill] by which State officers are to be punished?" Senator Trumbull replied: "Not State officers especially, but *everybody who violates the law. It is the intention to punish everybody who violates the law.*" [19]

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[17] Cong. Globe, 39th Cong., 1st Sess., 474. (Emphasis added.)

[18] *Id.,* at 475. (Emphasis added.)

[19] *Id.,* at 500. (Emphasis added.) The *Civil Rights Cases,* 109 U. S. 3, suggest how Senator Trumbull might have expected § 2 to

On January 29, Senator Trumbull also uttered the first of several remarkably similar and wholly unambiguous statements which indicated that the bill was aimed only at "state action." He said:

> "[This bill] may be assailed as drawing to the Federal Government powers that properly belong to 'States'; but I apprehend, rightly considered, it is not obnoxious to that objection. *It will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.*" [20]

Senator Trumbull several times reiterated this view. On February 2, replying to Senator Davis of Kentucky, he said:

> "Why, sir, *if the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky.* Are all the rights of the people of Kentucky gone because they cannot discriminate and punish one man for doing a thing that they do not punish another for doing? The bill draws to the Federal

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affect persons other than "officers" in spite of its "under color" language, for it was there said in dictum that:

"The Civil Rights Bill . . . is analogous . . . to [a law] under the original Constitution, declaring that the validity of contracts should not be impaired, and that if *any person* bound by a contract should refuse to comply with it, *under color or pretence that it had been rendered void or invalid by a State law,* he should be liable to an action upon it in the courts of the United States, *with the addition of a penalty for setting up such an unjust and unconstitutional defence.*" 109 U. S., at 17. (Emphasis added.)

[20] Cong. Globe, 39th Cong., 1st Sess., 476. (Emphasis added.)

> Government no power whatever if the States will perform their constitutional obligations." [21]

On April 4, after the President's veto of the bill, Senator Trumbull stated that "If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts . . . ." [22] Later the same day, he said:

> "This bill in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property. *It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union.*" [23]

The remarks just quoted constitute the plainest possible statement that the civil rights bill was intended to apply only to state-sanctioned conduct and not to purely private action. The Court has attempted to negate the force of these statements by citing other declarations by Senator Trumbull and others that the bill would operate everywhere in the country. See *ante*, at 426, n. 35. However, the obvious and natural way to reconcile these two sets of statements is to read the ones about the bill's nationwide application as declarations that the enactment of a racially discriminatory law in any State would bring the bill into effect there.[24] It seems to me that

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[21] *Id.*, at 600. (Emphasis added.)

[22] *Id.*, at 1758.

[23] *Id.*, at 1761. (Emphasis added.)

[24] Moreover, a few Northern States apparently did have laws which denied to Negroes rights enumerated in the Act. See G. Stephenson, Race Distinctions in American Law 36–39 (1910); L. Litwack, North of Slavery: The Negro in the Free States, 1790–1860, at 93–94 (1961).

very great weight must be given these statements of Senator Trumbull, for they were clearly made to reassure Northern and Border State Senators about the extent of the bill's operation in their States.

On April 4, Senator Trumbull gave two additional indications that the bill was intended to reach only state-sanctioned action. The first occurred during Senator Trumbull's defense of the part of § 3 of the bill which gave federal courts jurisdiction "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts . . . of the State or locality where they may be any of the rights secured to them by the first section of this act . . . ." Senator Trumbull said:

> "If it be necessary in order to protect the freedman in his rights that he should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him, I think we have the authority to confer that jurisdiction under the second clause of the [Thirteenth Amendment]." [25]

If the bill had been intended to reach purely private discrimination it seems very strange that Senator Trumbull did not think it necessary to defend the surely more dubious federal jurisdiction over cases involving no state action whatsoever. A few minutes later, Senator Trumbull reiterated that his reason for introducing the civil rights bill was to bring about "the passage of a law by Congress, securing equality in civil rights *when denied by State authorities* to freedmen and all other inhabitants of the United States . . . ." [26]

Thus, the Senate debates contain many explicit statements by the bill's own author, to whom the Senate natu-

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[25] Cong. Globe, 39th Cong., 1st Sess., 1759.

[26] *Id.*, at 1760. (Emphasis added.)

rally looked for an explanation of its terms, indicating that the bill would prohibit only state-sanctioned discrimination.

The Court puts forward in support of its construction an impressive number of quotations from and citations to the Senate debates. However, upon more circumspect analysis than the Court has chosen to give, virtually all of these appear to be either irrelevant or equally consistent with a "state action" interpretation. The Court's mention, *ante*, at 427, of a reference in the Senate debates to "white employers who refused to pay their Negro workers" surely does not militate against a "state action" construction, since "state action" would include conduct pursuant to "custom," and there was a very strong "custom" of refusing to pay slaves for work done. The Court's citation, *ante*, at 427–428, of Senate references to "white citizens who assaulted Negroes" is not in point, for the debate cited by the Court concerned the Freedmen's bill, not the civil rights bill.[27] The former by its terms forbade discrimination pursuant to "prejudice," as well as "custom," and in any event neither bill provided a remedy for the victim of a racially motivated assault.[28]

The Court's quotation, *ante*, at 429–430, of Senator Trumbull's December 13 reference to the then-embryonic civil rights bill is also compatible with a "state action" interpretation, at least when it is recalled that the unedited quotation, see *supra*, at 455, includes a statement that

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[27] See Cong. Globe, 39th Cong., 1st Sess., 339–340.

[28] The Court also gives prominence, see *ante*, at 428–429, to a report by General Carl Schurz which described private as well as official discrimination against freedmen in the South. However, it is apparent that the Senate regarded the report merely as background, and it figured relatively little in the debates. Moreover, to the extent that the described discrimination was the product of "custom," it would have been prohibited by the bill.

the second clause of the Thirteenth Amendment, the authority for the proposed bill, was intended solely as a check on state legislatures. Senator Trumbull's declaration the following day that the forthcoming bill would be aimed at discrimination pursuant to "a prevailing public sentiment" as well as to legislation, see *ante*, at 431, is also consistent with a "state action" reading of the bill, for the bill explicitly prohibited actions done under color of "custom" as well as of formal laws.

The three additional statements of Senator Trumbull and the remarks of senatorial opponents of the bill, quoted by the Court, *ante*, at 431–433, to show the bill's sweeping scope, are entirely ambiguous as to whether the speakers thought the bill prohibited only state-sanctioned conduct or reached wholly private action as well. Indeed, if the bill's opponents thought that it would have the latter effect, it seems a little surprising that they did not object more strenuously and explicitly.[29] The remark of Senator Lane which is quoted by the Court, *ante*, at 433, to prove that he viewed the bill as reaching " 'the white man . . . [who] would invoke the power of local prejudice' against the Negro," seems to have been quoted out of context. The quotation is taken from a part of Senator Lane's speech in which he defended the section of the bill permitting the President to invoke military authority when necessary to enforce the bill. After noting that there might be occasions "[w]here organized resistance to the legal authority assumes that shape that the officers cannot execute a writ," [30] Senator Lane concluded that "if [the white man] would invoke the power of local prejudice to override the laws of the country, this is no Government unless the military may be called in to enforce the order of the

[29] See *infra*, at 473–475.

[30] Cong. Globe, 39th Cong., 1st Sess., 603.

civil courts and obedience to the laws of the country." [31] It seems to me manifest that, taken in context, this remark is beside the point in this case.

The post-veto remarks of opponents of the bill, cited by the Court, *ante*, at 435, also are inconclusive. Once it is recognized that the word "right" as used in the bill is ambiguous, then Senator Cowan's statement, *ante*, at 435, that the bill would confer "the right . . . to purchase . . . real estate . . . without any qualification" [32] must inevitably share that ambiguity. The remarks of Senator Davis, *ibid.*, with respect to rental of hotel rooms and sale of church pews are, when viewed in context, even less helpful to the Court's thesis. For these comments were made immediately following Senator Davis' plaintive acknowledgment that "this measure proscribes all discriminations . . . that may be made . . . by any 'ordinance, regulation, or custom,' as well as by 'law or statute.' " [33] Senator Davis then observed that ordinances, regulations, and customs presently conferred upon white persons the most comfortable accommodations in ships and steamboats, hotels, churches, and railroad cars, and stated that "[t]his bill . . . declares all persons who enforce those distinctions to be criminals against the United States . . . ." [34] Thus, Senator Davis not only tied these obnoxious effects of the bill to its "customs" provision but alleged that they were brought about by § 2 as well as § 1. There is little wonder that his remarks "elicited no reply," see *ibid.*, from the bill's supporters.

The House debates are even fuller of statements indicating that the civil rights bill was intended to reach only state-endorsed discrimination. Representative Wilson

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[31] *Ibid.*

[32] See Cong. Globe, 39th Cong., 1st Sess., 1781.

[33] Cong. Globe, 39th Cong., 1st Sess., Appendix, 183.

[34] *Ibid.*

was the bill's sponsor in the House. On the very first day of House debate, March 1, Representative Wilson said in explaining the bill:

> "[I]f the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though all citizens were of one race or color, our troubles as a nation would be well-nigh over. . . . It will be observed that *the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States* on 'account of race, color, or previous condition of slavery.' " [35]

A few minutes later, Representative Wilson said:

> "Before our Constitution was formed, the great fundamental rights [which are embodied in this bill] belonged to every person who became a member of our great national family. . . . The entire machinery of government . . . was designed, among other things, to secure a more perfect enjoyment of these rights. . . . I assert that we possess the power to do those things which Governments are organized to do; *that we may protect a citizen of the United States against a violation of his rights by the law of a single State;* . . . that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States . . . ." [36]

These statements surely imply that Representative Wilson believed the bill to be aimed at state-sanctioned discrimination and not at purely private discrimination,

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[35] Cong. Globe, 39th Cong., 1st Sess., 1118. (Emphasis added.)

[36] *Id.*, at 1119. (Emphasis added.)

which of course existed unhindered "[b]efore our Constitution was formed."

Other congressmen expressed similar views. On March 2, Representative Thayer, one of the bill's supporters, said:

> "The events of the last four years . . . have changed [the freedmen] from a condition of slavery to that of freedom. The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty given to them by the American people.
>
> "Sir, *if it is competent for the new-formed Legislatures of the rebel States to enact laws* . . . which declare, for example, that they shall not have the privilege of purchasing a home for themselves and their families; . . . then I demand to know, of what practical value is the amendment abolishing slavery . . . ?" [37]

A few minutes later, he said:

> "Do you give freedom to a man when you allow him to be deprived of those great natural rights to which every man is entitled by nature? . . . [W]hat kind of freedom is that by which the man placed in a state of freedom is subject to the tyranny of *laws* which deprive him of [those] rights . . . ?" [38]

A little later, Representative Thayer added:

> "[The freedmen] are entitled to the benefit of that guarantee of the Constitution which secures to every citizen the enjoyment of life, liberty, and property, and no just reason exists why they should not enjoy the protection of that guarantee . . . .

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[37] *Id.*, at 1151. (Emphasis added.)

[38] *Id.*, at 1152. (Emphasis added.)

> "What is the necessity which gives occasion for that protection? Sir, in at least six of the lately rebellious States *the reconstructed Legislatures of those States have enacted laws* which, if permitted to be enforced, would strike a fatal blow at the liberty of the freedmen . . . ." [39]

An opponent of the bill, Representative Bingham, said on March 9:

> "[W]hat, then, is proposed by the provision of the first section? *Simply to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color* in any of the civil rights of the citizen." [40]

Representative Shellabarger, a supporter of the bill, discussed it on the same day. He began by stating that he had no doubt of the constitutionality of § 2 of the bill, provided Congress might enact § 1. With respect to § 1, he said:

> "Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike . . . . Self-evidently this is the whole effect of this first section. It secures . . . equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races. . . . It must . . . be noted that the violations of citizens' rights, which are reached and punished by this bill, are those which are inflicted under 'color of law,' &c. The bill does not reach mere private wrongs, but only those done under color of state authority . . . . [I]ts whole force is expended in defeating an attempt, under State laws, to deprive races and the

[39] *Id.*, at 1153. (Emphasis added.)
[40] *Id.*, at 1291. (Emphasis added.)

> members thereof as such of the rights enumerated in this act. This is the whole of it." [41]

Thus, Representative Shellabarger said in so many words that the bill had no impact on "mere private wrongs."

After the President's veto of the bill, Representative Lawrence, a supporter, stated his views. He said:

> "The bill does not declare who shall or shall not have the right to sue, give evidence, inherit, purchase, and sell property. These questions are left to the States to determine, subject only to the limitation that there are some inherent and inalienable rights pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws. . . .
>
> "Now, there are two ways in which a State may undertake to deprive citizens of these . . . rights: either by prohibitory laws, or by a failure to protect any one of them.
>
> "If the people of a State should become hostile to a large class of naturalized citizens *and should enact laws* to prohibit them and no other citizens . . . from inheriting, buying, holding, or selling property, . . . that would be prohibitory legislation. If the State *should simply enact laws* for native-born citizens *and provide no law* under which naturalized citizens could enjoy any one of these rights, and should deny them all protection by civil process or penal enactments, that would be a denial of justice." [42]

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[41] *Id.*, at 1293–1294. It is quite clear that Representative Shellabarger was speaking of the bill's first section, for he did not mention the second section until later in his speech, and then only briefly and in terms which indicated that he thought it co-extensive with the first ("I cannot remark on the second section further than to say that it is the ordinary case of providing punishment for violating a law of Congress."). See *id.*, at 1294.

[42] Cong. Globe, 39th Cong., 1st Sess., 1832–1833. (Emphasis added.)

From this passage it would appear that Representative Lawrence conceived of the word "right" in § 1 of the bill as referring to a right to equal legal status, and that he believed that the sole effect of the bill was to prohibit state-imposed discrimination.

The Court quotes and cites a number of passages from the House debates in aid of its construction of the bill. As in the case of the Senate debates, most of these appear upon close examination to provide little support. The first significant citation, *ante*, at 425, n. 33, is a dialogue between Representative Wilson and Representative Loan, another of the bill's supporters.

The full exchange went as follows:

> "Mr. LOAN. Mr. Speaker, I . . . ask the chairman . . . why the committee limit the provisions of the second section to those who act under the color of law. Why not let them apply to the whole community where the acts are committed?
>
> "Mr. WILSON, of Iowa. That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.
>
> "Mr. LOAN. What penalty is imposed upon others than officers who inflict these wrongs on the citizen?
>
> "Mr. WILSON, of Iowa. We are not making a general criminal code for the States.
>
> "Mr. LOAN. Why not abrogate those laws instead of inflicting penalties upon officers who execute writs under them?
>
> "Mr. WILSON, of Iowa. A law without a sanction is of very little force.
>
> "Mr. LOAN. Then why not put it in the bill directly?

"Mr. WILSON, of Iowa. That is what we are trying to do." [43]

The interpretation which the Court places on Representative Wilson's remarks, see *ante*, at 425, n. 33, is a conceivable one.[44] However, it is equally likely that, since both participants in the dialogue professed concern solely with § 2 of the bill, their remarks carried no implication about the scope of § 1. Moreover, it is possible to read the entire exchange as concerned with discrimination in communities having discriminatory laws, with Representative Loan urging that the laws should be abrogated directly or that all persons, not merely officers, who discriminated pursuant to them should be criminally punishable.

The next significant reliance upon the House debates is the Court's mention of references in the debates "to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities." *Ante*, at 427–428.[45] (Footnotes omitted.) As was pointed out in the discussion of the Senate debates, *supra*, at 462, the references to white men's refusals to pay freedmen

[43] *Id.*, at 1120.

[44] It is worthy of note, however, that if Representative Wilson believed that § 2 of the bill would apply only to state officers, and not to other members of the community, he apparently differed from the bill's author. See the remarks of Senator Trumbull quoted, *supra*, at 458.

[45] The Court's reliance, see *ante*, at 425, n. 33, on the statement of Representative Shellabarger that "the violations of citizens' rights, which are reached and punished by this bill, are those which are . . . done under color of state authority . . . ," Cong. Globe, 39th Cong., 1st Sess., 1294, seems very misplaced when the statement is taken in context. A fuller version of Representative Shellabarger's remarks will be found, *supra*, at 467–468.

and their agreements not to hire freedmen without their "masters' " consent are by no means contrary to a "state action" view of the civil rights bill, since the bill expressly forbade action pursuant to "custom" and both of these practices reflected "customs" from the time of slavery. The Court cites two different House references to assaults on Negroes by whites. The first was by Congressman Windom,[46] and close examination reveals that his only mention of assaults was with regard to a Texas "pass system," under which freedmen were whipped if found abroad without passes, and a South Carolina law permitting freedmen to be whipped for insolence.[47] Since these assaults were sanctioned by law, or at least by "custom," they would be reached by the bill even under a "state action" interpretation. The other allusion to assaults, as well as the mention of combinations of whites to drive freedmen from communities, occurred in a speech by Representative Lawrence.[48] These references were shortly preceded by the remarks of Congressman Lawrence quoted, *supra,* at 468, and were immediately followed by his comment that *"If States should undertake to authorize such offenses, or deny to a class of citizens all protection against them,* we may then inquire whether the nation itself may be destroyed . . . ." [49] These fore and aft remarks imply that Congressman Lawrence's concern was that the activities referred to would receive state sanction.

The Court, *ante,* at 428, n. 40, quotes a statement of Representative Eldridge, an opponent of the bill, in which he mentioned references by the bill's supporters to "individual cases of wrong perpetrated upon

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[46] See Cong. Globe, 39th Cong., 1st Sess., 1160.

[47] See *ibid.*

[48] See Cong. Globe, 39th Cong., 1st Sess., 1835.

[49] *Ibid.* (Emphasis added.)

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the freedmen of the South . . . ." [50] However, up to that time there had been no mention whatever in the House debates of any purely private discrimination,[51] so one can only conclude that by "individual cases" Representative Eldridge meant "isolated cases," not "cases of purely private discrimination."

The last significant reference [52] by the Court to the House debates is its statement, *ante*, at 434, that "Representative Cook of Illinois thought that, without appropriate federal legislation, any 'combination of men in [a] neighborhood [could] prevent [a Negro] from having any chance' to enjoy" the benefits of the Thirteenth Amendment. This quotation seems to be taken out of context. What Representative Cook said was:

> "[W]hen those rights which are enumerated in this bill are denied to any class of men on account of race or color, *when they are subject to a system of vagrant laws* which sells them into slavery or involuntary servitude, which operates upon them as upon no other part of the community, they are not secured in the rights of freedom. If a man can be sold, the man is a slave. If he is nominally freed by the amendment to the Constitution, . . . he has simply the labor of his hands on which he can depend. Any combination of men in his neighborhood can prevent him from having any chance to support himself by his labor. *They can pass a law* that a man not supporting himself by labor shall

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[50] Cong. Globe, 39th Cong., 1st Sess., 1156.

[51] See *id.*, at 1115–1124, 1151–1155.

[52] The emphasis given by the Court to the statement of Representative Thayer which is quoted, *ante*, at 433–434, surely evaporates when the statement is viewed in conjunction with Representative Thayer's immediately following remarks, quoted, *supra*, at 466–467.

> be deemed a vagrant, and that a vagrant shall be sold." [53]

These remarks clearly were addressed to discriminations effectuated by law, or sanctioned by "custom." As such, they would have been reached by the bill even under a "state action" interpretation.

D.

The foregoing analysis of the language, structure, and legislative history of the 1866 Civil Rights Act shows, I believe, that the Court's thesis that the Act was meant to extend to purely private action is open to the most serious doubt, if indeed it does not render that thesis wholly untenable. Another, albeit less tangible, consideration points in the same direction. Many of the legislators who took part in the congressional debates inevitably must have shared the individualistic ethic of their time, which emphasized personal freedom [54] and embodied a distaste for governmental interference which was soon to culminate in the era of laissez-faire.[55] It seems to me that most of these men would have regarded

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[53] *Id.*, at 1124. (Emphasis added.) Earlier in the same speech, Representative Cook had described actual vagrancy laws which had recently been passed by reconstructed Southern legislatures. See *id.*, at 1123–1124.

[54] An eminent American historian has said that the events of the last third of the 19th century took place "in a framework of pioneer individualistic mores . . . ." S. Morison, The Oxford History of the American People 788 (1965). See also 3 V. Parrington, Main Currents in American Thought 7–22 (1930).

[55] It has been suggested that the effort of the congressional radicals to enact a program of land reform in favor of the freedmen during Reconstruction failed in part because it smacked too much of "paternalism" and interference with property rights. See K. Stampp, The Era of Reconstruction 126–131 (1965).

it as a great intrusion on individual liberty for the Government to take from a man the power to refuse for personal reasons to enter into a purely private transaction involving the disposition of property, albeit those personal reasons might reflect racial bias. It should be remembered that racial prejudice was not uncommon in 1866, even outside the South.[56] Although Massachusetts had recently enacted the Nation's first law prohibiting racial discrimination in public accommodations,[57] Negroes could not ride within Philadelphia streetcars [58] or attend public schools with white children in New York City.[59] Only five States accorded equal voting rights to Negroes,[60] and it appears that Negroes were allowed to serve on juries only in Massachusetts.[61] Residential segregation was the prevailing pattern almost every-

[56] See generally M. Konvitz & T. Leskes, A Century of Civil Rights (1961); L. Litwack, North of Slavery: The Negro in the Free States, 1790–1860 (1961); K. Stampp, *supra*, at 12–17; G. Stephenson, Race Distinctions in American Law (1910); Maslow & Robison, Civil Rights Legislation and the Fight for Equality, 1862–1952, 20 U. Chi. L. Rev. 363 (1953).

[57] See M. Konvitz & T. Leskes, *supra*, at 155–156; 1864–1865 Mass. Acts and Resolves 650.

[58] Negroes were permitted to ride only on the front platforms of the cars. See L. Litwack, *supra*, at 112.

[59] Negro students in New York City were compelled to attend separate schools, called African schools, under authority of an 1864 New York State statute which empowered school officials to establish separate, equal schools for Negro children. See L. Litwack, *supra*, at 121, 133–134, 136, 151; G. Stephenson, *supra*, at 185; 1864 N. Y. Laws 1281. In 1883, the New York Court of Appeals held that students in Brooklyn might constitutionally be segregated pursuant to the statute. See *People ex rel. King* v. *Gallagher*, 93 N. Y. 438. In 1900, the statute was finally repealed and segregation legally forbidden. See 1900 N. Y. Laws, Vol. II, at 1173.

[60] See L. Litwack, *supra*, at 91–92. The States were Massachusetts, Rhode Island, Maine, New Hampshire, and Vermont. See *id.*, at 91.

[61] See L. Litwack, *supra*, at 94.

where in the North.[62] There were no state "fair housing" laws in 1866, and it appears that none had ever been proposed.[63] In this historical context, I cannot conceive that a bill thought to prohibit purely private discrimination not only in the sale or rental of housing but in *all* property transactions would not have received a great deal of criticism explicitly directed to this feature. The fact that the 1866 Act received *no* criticism of this kind[64] is for me strong additional evidence that it was not regarded as extending so far.

In sum, the most which can be said with assurance about the intended impact of the 1866 Civil Rights Act upon purely private discrimination is that the Act probably was envisioned by most members of Congress as prohibiting official, community-sanctioned discrimination in the South, engaged in pursuant to local "customs" which in the recent time of slavery probably were embodied in laws or regulations.[65] Acts done under the

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[62] See *id.*, at 168–170.

[63] It has been noted that:

"Residential housing, despite its importance . . . , appears to be the last of the major areas of discrimination that the states have been willing to attack." M. Konvitz & T. Leskes, *supra*, at 236.

And as recently as 1953, it could be said:

"Bills have been introduced in state legislatures to forbid racial or religious discrimination in 'multiple dwellings' (those housing three or more families), . . . but these proposals have not been considered seriously by any legislative body." Maslow & Robison, *supra*, at 408. (Footnotes omitted.)

[64] In contrast, the bill was repeatedly and vehemently attacked, in the face of emphatic denials by its sponsors, on the ground that it allegedly would invalidate two types of *state laws:* those denying Negroes equal voting rights and those prohibiting intermarriage. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 598, 600, 604, 606, 1121, 1157, 1263.

[65] The petitioners do not argue, and the Court does not suggest, that the discrimination complained of in this case was the product of such a "custom."

color of such "customs" were, of course, said by the Court in the *Civil Rights Cases*, 109 U. S. 3, to constitute "state action" prohibited by the Fourteenth Amendment. See *id.*, at 16, 17, 21. Adoption of a "state action" construction of the Civil Rights Act would therefore have the additional merit of bringing its interpretation into line with that of the Fourteenth Amendment, which this Court has consistently held to reach only "state action." This seems especially desirable in light of the wide agreement that a major purpose of the Fourteenth Amendment, at least in the minds of its congressional proponents, was to assure that the rights conferred by the then recently enacted Civil Rights Act could not be taken away by a subsequent Congress.[66]

II.

The foregoing, I think, amply demonstrates that the Court has chosen to resolve this case by according to a loosely worded statute a meaning which is open to the strongest challenge in light of the statute's legislative history. In holding that the Thirteenth Amendment is sufficient constitutional authority for § 1982 as interpreted, the Court also decides a question of great importance. Even contemporary supporters of the aims of the 1866 Civil Rights Act doubted that those goals could constitutionally be achieved under the Thirteenth Amendment,[67] and this Court has twice expressed similar

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[66] See, *e. g.*, H. Flack, The Adoption of the Fourteenth Amendment 94 (1908); J. James, The Framing of the Fourteenth Amendment 126–128, 179 (1956); 2 S. Morison & H. Commager, The Growth of the American Republic 39 (4th ed. 1950); K. Stampp, *supra*, at 136; J. tenBroek, Equal Under Law 224 (1965); L. Warsoff, Equality and the Law 126 (1938).

[67] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 504–505 (Senator Johnson); *id.*, at 1291–1293 (Representative Bingham).

doubts. See *Hodges* v. *United States*, 203 U. S. 1, 16–18; *Corrigan* v. *Buckley*, 271 U. S. 323, 330. But cf. *Civil Rights Cases*, 109 U. S. 3, 22. Thus, it is plain that the course of decision followed by the Court today entails the resolution of important and difficult issues.

The only apparent way of deciding this case without reaching those issues would be to hold that the petitioners are entitled to relief on the alternative ground advanced by them: that the respondents' conduct amounted to "state action" forbidden by the Fourteenth Amendment. However, that route is not without formidable obstacles of its own, for the opinion of the Court of Appeals makes it clear that this case differs substantially from any "state action" case previously decided by this Court. See 379 F. 2d, at 40–45.

The fact that a case is "hard" does not, of course, relieve a judge of his duty to decide it. Since, the Court did vote to hear this case, I normally would consider myself obligated to decide whether the petitioners are entitled to relief on either of the grounds on which they rely. After mature reflection, however, I have concluded that this is one of those rare instances in which an event which occurs after the hearing of argument so diminishes a case's public significance, when viewed in light of the difficulty of the questions presented, as to justify this Court in dismissing the writ as improvidently granted.

The occurrence to which I refer is the recent enactment of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73. Title VIII of that Act contains comprehensive "fair housing" provisions, which by the terms of § 803 will become applicable on January 1, 1969, to persons who, like the petitioners, attempt to buy houses from developers. Under those provisions, such persons will be entitled to injunctive relief and damages from developers

who refuse to sell to them on account of race or color, unless the parties are able to resolve their dispute by other means. Thus, the type of relief which the petitioners seek will be available within seven months' time under the terms of a presumptively constitutional Act of Congress.[68] In these circumstances, it seems obvious that the case has lost most of its public importance, and I believe that it would be much the wiser course for this Court to refrain from deciding it. I think it particularly unfortunate for the Court to persist in deciding this case on the basis of a highly questionable interpretation of a sweeping, century-old statute which, as the Court acknowledges, see *ante*, at 415, contains none of the exemptions which the Congress of our own time found it necessary to include in a statute regulating relationships so personal in nature. In effect, this Court, by its construction of § 1982, has extended the coverage of federal "fair housing" laws far beyond that which Congress in its wisdom chose to provide in the Civil Rights Act of 1968. The political process now having taken hold again in this very field, I am at a loss to understand why the Court should have deemed it appropriate or, in the circumstances of this case, necessary to proceed with such precipitate and insecure strides.

I am not dissuaded from my view by the circumstance that the 1968 Act was enacted after oral argument in this case, at a time when the parties and *amici curiae* had invested time and money in anticipation of a decision on the merits, or by the fact that the 1968 Act apparently will not entitle these petitioners to the relief which they seek.[69] For the certiorari jurisdiction was not

[68] Of course, the question of the constitutionality of the "fair housing" provisions of the 1968 Civil Rights Act is not before us, and I intend no implication about how I would decide that issue.

[69] See *ante*, at 417, n. 21.

conferred upon this Court "merely to give the defeated party in the . . . Court of Appeals another hearing," *Magnum Co.* v. *Coty*, 262 U. S. 159, 163, or "for the benefit of the particular litigants," *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 74, but to decide issues, "the settlement of which is of importance to the public as distinguished from . . . the parties," *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393. I deem it far more important that this Court should avoid, if possible, the decision of constitutional and unusually difficult statutory questions than that we fulfill the expectations of every litigant who appears before us.

One prior decision of this Court especially suggests dismissal of the writ as the proper course in these unusual circumstances. In *Rice* v. *Sioux City Cemetery*, *supra*, the issue was whether a privately owned cemetery might defend a suit for breach of a contract to bury on the ground that the decedent was a Winnebago Indian and the contract restricted burial privileges to Caucasians. In considering a petition for rehearing following an initial affirmance by an equally divided Court, there came to the Court's attention for the first time an Iowa statute which prohibited cemeteries from discriminating on account of race, but which would not have benefited the *Rice* petitioner because of an exception for "pending litigation." Mr. Justice Frankfurter, speaking for a majority of the Court, held that the writ should be dismissed. He pointed out that the case presented "evident difficulties," 349 U. S., at 77, and noted that "[h]ad the statute been properly brought to our attention . . . , the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance." *Id.*, at 76–77. This case certainly presents difficulties as substantial as those in *Rice*. Compare what has been said in this opinion with 349 U. S.,

at 72–73; see also *Bell* v. *Maryland,* 378 U. S. 226. And if the petition for a writ of certiorari in this case had been filed a few months after, rather than a few months before, the passage of the 1968 Civil Rights Act, I venture to say that the case would have been deemed to possess such "isolated significance," in comparison with its difficulties, that the petition would not have been granted.

For these reasons, I would dismiss the writ of certiorari as improvidently granted.

HANOVER SHOE, INC. *v.* UNITED SHOE MACHINERY CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 335. Argued March 5, 1968.—Decided June 17, 1968.*

Following this Court's affirmance of a district court judgment in a civil action against United Shoe Machinery Corp. (United), a manufacturer and distributor of shoe machinery, which the Government had brought under § 4 of the Sherman Act, Hanover Shoe, Inc. (Hanover), a shoe manufacturer and customer of United's, brought this private treble-damage suit against United for its alleged monopolization of the shoe machinery industry in violation of § 2 of the Sherman Act, by means of its practice of leasing and refusing to sell its shoe machinery. Hanover, relying on § 5 (a) of the Clayton Act (making a final judgment or decree in a Government antitrust suit prima facie evidence as to all matters respecting which the judgment or decree would be an estoppel between the parties thereto), submitted the court's findings, opinion, and decree in the Government's case as its evidence that United had monopolized the shoe machinery industry and that its refusal to sell the machines was an instrument of the monopolization. In 1965 the District Court rendered judgment for Hanover, holding that it was entitled to damages for the period from July 1, 1939 (the earliest date permitted by the statute of limitations), to September 21, 1955, when this suit was filed, in an amount equal to three times the difference between what Hanover had paid in rentals and what it would have paid had United been willing to sell the machines, plus interest. The Court of Appeals affirmed as to liability, but disagreed with the District Court on certain aspects of the damage award, including the relevant damage period. It fixed that period's end date somewhat earlier and ruled that its start was June 10, 1946, when this Court decided *American Tobacco Co.* v. *United States*, 328 U. S. 781, and endorsed the views in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. A. 2d Cir.), prior to which the Court of Appeals concluded it had been necessary in an action for violation of § 2 to prove the

*Together with No. 463, *United Shoe Machinery Corp.* v. *Hanover Shoe, Inc.*, also on certiorari to the same court.

existence of predatory practices as well as monopoly power. Both parties were granted review of the Court of Appeals decision. United contends that the decision in the Government's suit against it did not determine that United's leasing practice was an instrument of monopolization; that Hanover sustained no injury since any excess cost of leasing over cost of ownership was not absorbed by Hanover but passed on to its customers; and that the District Court's damage calculations which the Court of Appeals upheld were erroneous because they did not properly allow for the cost of capital to Hanover as an element of the cost of acquiring the shoe machinery, the District Court having made an adjustment only to the extent of deducting a 2.5% interest component from the profits it thought Hanover would have earned by buying the machines. Hanover contends that the Court of Appeals erred in changing the start of the damage period and in ordering the District Court on remand to reduce its damage calculations by whatever tax advantages Hanover might have obtained by leasing as compared with buying the shoe machinery. *Held:*

1. The courts below did not err in holding that United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization in the Government's case, as reference to the court's findings and opinion, as well as decree, in that case makes clear. Pp. 483–487.

2. Hanover proved injury and the amount of its damages within the meaning of § 4 of the Clayton Act when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; and the possibility that it might have recouped the overcharge by "passing it on" to its customers was not relevant in the assessment of its damages. Pp. 487–494.

3. Hanover is entitled to damages for the entire period of the applicable statute of limitations, since the *Alcoa-American Tobacco* decisions did not fundamentally alter the law of monopolization in a way which should be given only prospective effect. Pp. 495–502.

4. The District Court did not otherwise err in its computation of damages. Pp. 502–504.

377 F. 2d 776, affirmed in part, reversed in part, and remanded.

James V. Hayes argued the cause for petitioner in No. 335 and respondent in No. 463. With him on the briefs were *Breck P. McAllister* and *Robert F. Morten.*

Ralph M. Carson argued the cause for respondent in No. 335 and petitioner in No. 463. With him on the briefs were *Robert D. Salinger, Philip C. Potter, Jr.,* and *Roland W. Donnem.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Hanover Shoe, Inc. (hereafter Hanover) is a manufacturer of shoes and a customer of United Shoe Machinery Corporation (hereafter United), a manufacturer and distributor of shoe machinery. In 1954 this Court affirmed the judgment of the District Court for the District of Massachusetts, 110 F. Supp. 295 (1953), in favor of the United States in a civil action against United under § 4 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 4. *United Shoe Machinery Corp.* v. *United States,* 347 U. S. 521. In 1955, Hanover brought the present treble-damage action against United in the District Court for the Middle District of Pennsylvania. In 1965 the District Court rendered judgment for Hanover and awarded trebled damages, including interest, of $4,239,609, as well as $650,000 in counsel fees. 245 F. Supp. 258. On appeal, the Court of Appeals for the Third Circuit affirmed the finding of liability but disagreed with the District Court on certain questions relating to the damage award. 377 F. 2d 776 (1967). Both Hanover and United sought review of the Court of Appeals' decision, and we granted both petitions. 389 U. S. 818 (1967).

I.

Hanover's action against United alleged that United had monopolized the shoe machinery industry in violation of § 2 of the Sherman Act; that United's practice of leasing and refusing to sell its more complicated and important shoe machinery had been an instrument of the unlawful monopolization; and that therefore Han-

over should recover from United the difference between what it paid United in shoe machine rentals and what it would have paid had United been willing during the relevant period to sell those machines.

Section 5 (a) of the Clayton Act, 38 Stat. 731, as amended, 69 Stat. 283, 15 U. S. C. § 16 (a), makes a final judgment or decree in any civil or criminal suit brought by the United States under the antitrust laws "prima facie evidence . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ." Relying on this provision, Hanover submitted the findings, opinion, and decree rendered by Judge Wyzanski in the Government's case as evidence that United monopolized and that the practice of refusing to sell machines was an instrument of the monopolization. United does not contest that prima facie weight is to be given to the judgment in the Government's case. It does, however, contend that Judge Wyzanski's decision did not determine that the practice of leasing and refusing to sell was an instrument of monopolization. This claim, rejected by the courts below, is the threshold issue in No. 463. If the 1953 judgment is not prima facie evidence of the illegality of the practice from which Hanover's asserted injury arose, then Hanover, having offered no other convincing evidence of illegality, should not have recovered at all.[1]

Both the District Court and the Court of Appeals concluded that the lease only policy had been held illegal in

[1] Following the District Court's rejection of United's construction of Judge Wyzanski's opinion and decree, United filed a motion requesting that the District Court certify the question of construction to Judge Wyzanski. United contends that the District Court erred in denying this motion, but we need not pass upon the merits of United's novel request, for the District Court clearly acted within its proper discretion in denying as untimely certification to another court of a question upon which it had already ruled.

the Government's suit. We find no error in that determination. It is true that § 4 of the decree [2] on which United relies condemned only certain clauses in the standard lease and that nowhere in the decree was any other aspect of United's leasing system expressly described or characterized as illegal monopolization. It is also arguable that § 5 of the decree, which required that United thenceforward not "offer for lease any machine type, unless it also offers such type for sale," was included merely to insure an effective remedy to dissipate the accumulated consequences of United's monopolization. We are not, however, limited to the decree in determining the extent of estoppel resulting from the judgment in the Government's case. If by reference to the findings, opinion, and decree it is determined that an issue was actually adjudicated in an antitrust suit brought by the Government, the private plaintiff can treat the outcome of the Government's case as prima facie evidence on that issue. See *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 566–569 (1951).

Section 5 of the decree would have been a justifiable remedy even if the practice it banned had not been instrumental in the monopolization of the market. But in our view the trial court's findings and opinion put on firm ground the proposition that the Government's case involved condemnation of the lease only system as such. In both its opinion with respect to violation and its opinion with respect to remedy, the court not only dealt with the objectionable clauses in the standard

[2] "4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." 110 F. Supp., at 352.

lease but also addressed itself to the consequences of only leasing machines and to the manner in which that practice related to the maintenance of United's monopoly power.[3] These portions of the court's opinion are well supported by its findings of fact, which also estop United as against the Government and which therefore constitute prima facie evidence in this case. We have set out the relevant findings in an Appendix to this opinion. They are themselves sufficient to show that the lease only system played a significant role in United's monopolization of the shoe machinery market. Those findings were not limited to the particular provisions of United's

[3] In its opinion on remedy, in answering United's objection to its conclusion that the decree should require United to offer machines for sale as well as for lease, the court plainly said that United "has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market." 110 F. Supp., at 350. Clearly, if after purging the leases of objectionable clauses United would still be monopolizing by leasing but not selling its machines, the lease only policy must also have made a substantial contribution to United's monopolization of the market during the period prior to the entry of the judgment. Moreover, in its opinion on violation, where the three principal sources of United's market power were identified, the court pointed to "the magnetic ties inherent in its system of leasing, and not selling, its more important machines" and to the "'partnership'" aspects of leasing but not selling those machines. 110 F. Supp., at 344. The leases assured "closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers." *Id.*, at 343. A shoe manufacturer by leasing was "deterred more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancelation before the end of the term." *Id.*, at 340. The lease system had "aided United in maintaining a pricing system which discriminates between machine types," *id.*, at 344, discrimination which the court later said had evidenced "United's monopoly power, a buttress to it, and a cause of its perpetuation . . . ." *Id.*, at 349.

leases. They dealt as well with United's policy of leasing but not selling its important machines, with the advantages of that practice to United, and with its impact on potential and actual competition. When the applicable standard for determining monopolization under § 2 is applied to these facts, it must be concluded that the District Court and the Court of Appeals did not err in holding that United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization in the Government's case.[4]

II.

The District Court found that Hanover would have bought rather than leased from United had it been given the opportunity to do so.[5] The District Court determined that if United had sold its important machines, the cost to Hanover would have been less than the rental paid for leasing these same machines. This difference in cost, trebled, is the judgment awarded to Hanover in the District Court. United claims, however, that Hanover suffered no legally cognizable injury, contending

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[4] In its brief on appeal from the judgment and decree rendered in the Government's case, United recognized that "[t]he principal practices which the [District] Court stressed were that defendant offered important complicated machines only for lease and not for sale and that defendant serviced the leased machines without a separate charge." Brief for Appellant 6, *United Shoe Machinery Corp.* v. *United States*, 347 U. S. 521 (1954). United also said that "[e]vidently the Court below regarded the fact that United distributes its more important machines only by lease and not by sale as the basic objection to the system." *Id.*, at 170.

[5] The Court of Appeals affirmed this finding and we do not disturb it. See also n. 16, *infra*. We also agree with the courts below that in the circumstances of this case it was unnecessary for Hanover to prove an explicit demand during the damage period. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699 (1962).

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that the illegal overcharge during the damage period was reflected in the price charged for shoes sold by Hanover to its customers and that Hanover, if it had bought machines at lower prices, would have charged less and made no more profit than it made by leasing. At the very least, United urges, the District Court should have determined on the evidence offered whether these contentions were correct. The Court of Appeals, like the District Court, rejected this assertion of the so-called "passing-on" defense, and we affirm that judgment.[6]

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, provides that any person "who shall be injured

[6] The chronology of events with respect to this issue in the lower courts was as follows: After the pretrial conference, a separate issue which was thought might determine the action was set for trial pursuant to Fed. Rule Civ. Proc. 42 (b). The general question was whether, assuming that Hanover had paid illegally high prices for machinery leased from United, Hanover had passed the cost on to its customers, and if so whether it had suffered legal injury for which it could recover under the antitrust laws. After evidence had been taken on the issue, Judge Goodrich, sitting by designation, ruled that when Hanover had been forced to pay excessive prices for machinery leased from United, it had suffered a legal injury: "This excessive price is the injury." 185 F. Supp. 826, 829 (D. C. M. D. Pa. 1960). He also rejected the argument "that the defendant is relieved of liability because the plaintiff passed on its loss to its customers." *Ibid.* In his view it was unnecessary to determine whether Hanover had passed on the illegal burden because Hanover's injury was complete when it paid the excessive rentals and because "'[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step'" and to exonerate a defendant by reason of remote consequences. *Id.*, at 830 (quoting from *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918)). The Court of Appeals heard an interlocutory appeal pursuant to 28 U. S. C. § 1292 (b) and affirmed. 281 F. 2d 481 (C. A. 3d Cir. 1960). Certiorari was denied. 364 U. S. 901 (1960). United preserved the issue and presented it again to the Court of Appeals in appealing the treble-damage judgment entered after trial of the main case. The Court of Appeals adhered to the principles of its prior decision. United brought the question here.

in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ." We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4.

If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.

Fundamentally, this is the view stated by Mr. Justice Holmes in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390 (1906), where Atlanta sued the defendants for treble damages for antitrust violations in connection with the city's purchases of pipe for its waterworks system. The Court affirmed a judgment in favor of the city for an amount measured by the difference between the price paid and what the market or fair price would have been had the sellers not com-

bined, the Court saying that the city "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.*, at 396. The same approach was evident in *Thomsen* v. *Cayser*, 243 U. S. 66 (1917), another treble-damage antitrust case.[7] With respect to overcharge cases arising under the transportation laws, similar views were expressed by Mr. Justice Holmes in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918), and by Mr. Justice Brandeis in *Adams* v. *Mills*, 286 U. S. 397, 406–408 (1932). In those cases the possibility that plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages.[8]

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[7] "It is, however, contended that even if it be assumed the facts show an illegal combination, they do not show injury to the plaintiffs by reason thereof. The contention is untenable. Section 7 of the act gives a cause of action to any person injured in his person or property by reason of anything forbidden by the act and the right to recover three-fold the damages by him sustained. The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury and the verdict represented their conclusion." 243 U. S., at 88.

[8] *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531 (1918), involved an action for reparations brought by shippers against a railroad. The shippers alleged exaction of an unreasonably high rate. To the claim that the shippers should not recover because they were able to pass on to their customers the damage they sustained by paying the charge, the Court said that the answer was not difficult:

"The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote

United seeks to limit the general principle that the victim of an overcharge is damaged within the meaning of § 4 to the extent of that overcharge. The rule, United argues, should be subject to the defense that economic

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consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. . . . The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. . . . Probably in the end the public pays the damages in most cases of compensated torts." 245 U. S., at 533–534. *Adams* v. *Mills*, 286 U. S. 397 (1932), is to the same effect. See also *I. C. C.* v. *United States*, 289 U. S. 385 (1933).

Keogh v. *Chicago & N. W. R. Co.*, 260 U. S. 156 (1922), is relied upon by United as stating a contrary rule. There the Court affirmed a judgment on the pleadings in a shipper's action under the antitrust laws charging a conspiracy among railroads to set unreasonably high rates. Because the rates had been approved as reasonable after a proceeding before the Interstate Commerce Commission, the shipper was held to have no cause of action under the antitrust laws. After giving this and other reasons for its judgment, the Court ended its opinion by saying that it would have been impossible for the shipper to have proved damages since no court could say that if the rate had been lower the shipper would have enjoyed the difference; the benefit might have gone to his customers. The Court, however, was careful to say earlier in its opinion that the result would have been different had the rate been unreasonably high, an approach confirmed by Mr. Justice Brandeis in *Adams* v. *Mills*, *supra*. We ascribe no general significance to the *Keogh* dictum for cases where the plaintiff is free to prove that he has been charged an illegally high price. It should also be noted that the Court, in speaking of the impossibility of proving damages, indicated no intention to preclude recovery in cases such as *Chattanooga Foundry* or *Thomsen* v. *Cayser*, *supra*.

That is where the matter stood in this Court when the issue came to be pressed with some regularity in the lower federal courts in treble-damage suits brought by customers of vendors who were charged with violating the Sherman Act by price fixing or monopolization. Some courts sustained the defense, both where the plaintiff complained of overcharging for materials or services used by

circumstances were such that the overcharged buyer could only charge his customers a higher price *because* the price to him was higher. It is argued that in such circumstances the buyer suffers no loss from the overcharge. This situation might be present, it is said, where the overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product is so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequent decline in sales.

We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether,

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him to produce his own product, *e. g., Wolfe* v. *National Lead Co.*, 225 F. 2d 427 (C. A. 9th Cir.), cert. denied, 350 U. S. 915 (1955), and where the price fixing concerned articles purchased for resale, *e. g., Miller Motors, Inc.* v. *Ford Motor Co.*, 252 F. 2d 441 (C. A. 4th Cir. 1958); *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. 2d 747 (C. A. 8th Cir.), cert. denied, 314 U. S. 644 (1941). Others, beginning with Judge Goodrich's 1960 decision in the case before us, deemed it irrelevant that the plaintiff may have passed on the burden of the overcharge. Recently, for example, the defense was rejected in the cases brought against manufacturers of electrical equipment by local utilities who purchased equipment at unlawfully inflated prices and used it to produce electricity sold to the ultimate consumer. *E. g., Atlantic City Electric Co.* v. *General Electric Co.*, 226 F. Supp. 59 (D. C. S. D. N. Y.), interlocutory appeal refused, 337 F. 2d 844 (C. A. 2d Cir. 1964).

Concerning the passing-on defense generally, see Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 Mich. L. Rev. 363 (1954); Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5 (1966); Note, Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business, 80 Harv. L. Rev. 1566, 1584–1586 (1967).

had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.[9] On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.

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[9] The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing-on defense. We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present. We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer.[10]

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[10] Some courts appear to have treated price discrimination cases under the Robinson-Patman Act as in this category. See, *e. g.*, *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38 (C. A. 8th Cir. 1951); *American Can Co.* v. *Bruce's Juices*, 187 F. 2d 919, opinion modified, 190 F. 2d 73 (C. A. 5th Cir.), petition for cert. dismissed, 342 U. S. 875 (1951).

III.

The District Court held that Hanover was entitled to damages for the period commencing July 1, 1939, and terminating September 21, 1955. The former date represented the greatest retrospective reach permitted under the applicable statute of limitations, and the latter date was that upon which Hanover filed its suit. In addition to somewhat shortening the forward reach of the damage period,[11] the Court of Appeals ruled that June 10, 1946, rather than July 1, 1939, marked the commencement of the damages period. June 10, 1946, was the date this Court decided *American Tobacco Co.* v. *United States,* 328 U. S. 781, which endorsed the views of the Court of Appeals for the Second Circuit in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (1945). In the case before us the Court of Appeals concluded that the decisions in *Alcoa-American Tobacco* fundamentally altered the law of monopolization—that prior to them it was necessary to prove the existence of predatory practices as well as monopoly power, whereas afterwards proof of predatory practices was not essential. The Court of Appeals was also of the view that because in prior litigation United's leases had escaped condemnation as predatory practices illegal under § 1, United's conduct should not be held to have violated § 2 at any time prior to June 10, 1946. 377 F. 2d, at 790. This holding has been challenged, and we reverse it.

[11] The Court of Appeals held that Hanover was entitled to damages only up to June 1, 1955, the date upon which Judge Wyzanski approved United's plan for terminating all outstanding leases and converting the lessee's rights to ownership. Because Hanover could have legally required United to convert from leasing to selling as of June 1, 1955, the Court of Appeals held it was not entitled to damages for United's failure to offer machines for sale after that date. This determination has not been challenged in this Court.

The theory of the Court of Appeals seems to have been that when a party has significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. Pointing to recent decisions of this Court in the area of the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well as in the civil area, especially in a treble-damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals.

Neither the opinion in *Alcoa* nor the opinion in *American Tobacco* indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by those courts. In ruling that it was not necessary to exclude competitors to be guilty of monopolization, the Court of Appeals for the Second Circuit relied upon a long line of cases in this Court stretching back to 1912. 148 F. 2d, at 429. The conclusion that actions which will show monopolization are not "limited to manoeuvres not honestly industrial" was also premised on earlier opinions of this Court, particularly *United States* v. *Swift & Co.*, 286 U. S. 106, 116 (1932). In the *American Tobacco* case, this Court noted

that the precise question before it had not been previously decided, 328 U. S., at 811, and gave no indication that it thought it was adopting a radically new interpretation of the Sherman Act. Like the Court of Appeals, this Court relied for its conclusion upon existing authorities.[12] These cases make it clear that there was no ac-

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[12] Although the defendants in *American Tobacco* had been found guilty of conspiracy to restrain trade and of attempt and conspiracy to monopolize as well as of monopolization itself, the grant of certiorari was "limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under § 2 of the Sherman Act." 324 U. S. 836 (1945). After noting that "§§ 1 and 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other . . . ," 328 U. S., at 788, the Court determined that the jury could have found that the defendants had combined and conspired to monopolize, *id.*, at 797, and that it would be "only in conjunction with such a combination or conspiracy that these cases will constitute a precedent," *id.*, at 798. The Court stated that "[t]he *authorities* support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so," 328 U. S., at 811 (emphasis added), and quoted with approval from *United States* v. *Patten*, 187 F. 664, 672 (C. C. S. D. N. Y. (1911)), reversed on other grounds, 226 U. S. 525 (1913), that for there to be monopolization "[i]t is not necessary that the power thus obtained should be exercised. Its existence is sufficient." The Court also said:

"A correct interpretation of the statute *and of the authorities* makes it the crime of monopolizing, under § 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59 and authorities cited.

"It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It

cepted interpretation of the Sherman Act which conditioned a finding of monopolization under § 2 upon a showing of predatory practices by the monopolist.[13] In neither case was there such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one. Whatever

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is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." 328 U. S., at 809. (Emphasis added.)

The Court also welcomed the opportunity to endorse, 328 U. S., at 813–814, the following views of Chief Judge Hand in *Alcoa*, 148 F. 2d., at 431–432:

"[Alcoa] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.

. . . . .

"In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific,' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing."

[13] Any view of the earlier law of monopolization which would attempt, erroneously in our opinion, to find a requirement of predatory practices must rely heavily on certain dicta in *United States* v. *United States Steel Corp.*, 251 U. S. 417, 451 (1920) (Mr. Justice McKenna for a four-to-three Court), and *United States* v. *International Harvester Co.*, 274 U. S. 693, 708 (1927) (Mr. Justice Sanford reiterating the dicta in *U. S. Steel*). The commentators cited by United for the proposition that predatory practices were required prior to *Alcoa-American Tobacco* place major reliance on these dicta. In any event, the cursory and conclusory nature of these writings clearly does not provide sufficiently strong proof of a prevailing opinion as to the law to have permitted the sort of justifiable reliance which alone could generate a prospectivity argument.

development in antitrust law was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years. These cases did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks. We cannot say that prior to those cases potential antitrust defendants would have been justified in thinking that then current antitrust doctrines permitted them to do all acts conducive to the creation or maintenance of a monopoly, so long as they avoided direct exclusion of competitors or other predatory acts.[14]

United relies heavily on three Sherman Act cases brought against it or its predecessors by the United States and decided by this Court. United argues that these cases demonstrate both that before *Alcoa-American Tobacco* the law was substantially different and that its leasing practices had been deemed by this Court not to be instruments of monopolization. *United States* v. *Winslow*, 227 U. S. 202 (1913); *United States* v. *United Shoe Machinery Co. of New Jersey*, 247 U. S. 32 (1918); *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922). In our opinion, however, United overreads and exaggerates the significance of these three cases. In *Winslow*, the Government charged the three groups of companies which had merged to form United with a violation of § 1. The trial court construed the indictment to pertain only to the merger of the companies and not to business practices which resulted from the merger; most significantly, it excluded United's leasing policies

[14] United makes the independent argument that Judge Wyzanski's decision in the Government's case so fundamentally altered the law of monopolization that it should not be held liable for damages prior to the date the decision was handed down, February 18, 1953. We reject this contention for the reasons set forth in the textual discussion of *Alcoa-American Tobacco* and the previous *United* cases.

from consideration. The Court specifically stated that "[t]he validity of the leases or of a combination contemplating them cannot be passed upon in this case." 227 U. S., at 217.

The third case, decided in 1922, was brought under § 3 of the Clayton Act rather than § 2 of the Sherman Act. This Court affirmed a decree enjoining United from making leases containing certain clauses, terms, and conditions. Nothing in that case indicates that predatory practices had to be shown to prove a § 2 monopoly charge or that the leases, or the clauses in them which were left undisturbed, would not adequately demonstrate monopolization by an enterprise with monopoly power.

Of the three cases, the 1918 case most strongly supports United. It involved a civil action by the United States charging violations of §§ 1 and 2 of the Sherman Act. The Government contended that United's machinery leases and license agreements had been used to consummate both violations. A three-judge court dismissed the bill and this Court affirmed by a vote of 4 to 3. There is no question but that the leases as they were then constituted were held unassailable under § 1; the reasons for this ruling are not clear. As for the § 2 charge, we cannot read the opinion as specifying what course of conduct would amount to monopolization under § 2 if engaged in by a concern with monopoly power. At most the holding was that the leases themselves did not prove a § 2 charge—did not themselves prove monopoly power as well as monopolization. But the issue in the case before us now is not whether United's leasing system proves monopoly power but whether, once monopoly power is shown, leasing the way United leased sufficiently shows an intent to exercise that power. There is little, if anything, in the 1918 opinion which is illuminating on this issue. Indeed, it may fairly be read as holding that United did not have monopoly power over the market at all, for in rejecting the claim that United's practice of

leasing was illegal when used by a corporation dominant in the market, the Court said:

> "This, however, is assertion and relies for its foundation upon the assumption of an illegal dominance by the United Company that has been found not to exist. This element, therefore, must be put to one side and the leases regarded in and of themselves and by the incentives that induced their execution . . . ." 247 U. S., at 60.

Any comfort United might have received from the 1918 case with respect to the legality of its leasing system when employed by one with monopoly power should have been short-lived. In the third case, which was brought under § 3 of the Clayton Act, and in which all the remaining Justices making up the majority in the 1918 case except Mr. Justice McKenna voted with the Court, the opinion for the Court described the 1918 decision as follows:

> "That the leases were attacked under the former bill as violative of the Sherman Act is true, but they were sustained as valid and binding agreements within the rights of holders of patents." 258 U. S., at 460.

This view was supported by other references to the 1918 opinion which described the question at issue there as being whether United's leases went beyond the exercise of a lawful monopoly.

One might possibly disagree with this reading of the 1918 opinion, but it was an authoritative gloss. After 1922 and after the expiration of the patents on its major machines, there was no sound basis to justify reliance by United on the 1918 case as a definitive pronouncement that its leasing system provided legally insufficient evidence of monopolization, once United's power over the market was satisfactorily shown. The prior cases immunized United's monopoly insofar as it originated

in a merger of allegedly competing companies and perhaps are of some help to United in other respects. But they do not establish either that prior to 1946 there was a well-defined interpretation of the Sherman Act which was abruptly overruled in *Alcoa-American Tobacco* or that United's leasing system could not be considered an instrument for the exercise and maintenance of monopoly power.

In these circumstances, there is no room for argument that Hanover's damages should reach back only to the date of the *American Tobacco* decision. Having rejected the contention that *Alcoa-American Tobacco* changed the law of monopolization in a way which should be given only prospective effect, it follows that Hanover is entitled to damages for the entire period permitted by the applicable statute of limitations.[15]

IV.

Two questions are raised here about the manner in which damages were computed by the courts below. Hanover argues that the Court of Appeals erred in requiring the District Court, on remand, to take account of the additional taxes Hanover would have paid, had it purchased machines instead of renting them during the years in question. The Court of Appeals evidently

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[15] United has also advanced the argument that because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's cause of action arose during that year and is now barred by the applicable Pennsylvania statute of limitations. The Court of Appeals correctly rejected United's argument in its supplemental opinion. We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Cf. *Emich Motors Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (C. A. 7th Cir. 1956), upon which United relies. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

felt that since only after-tax profits can be reinvested or distributed to shareholders, Hanover was damaged only to the extent of the after-tax profits that it failed to receive. The view of the Court of Appeals is sound in theory, but it overlooks the fact that in practice the Internal Revenue Service has taxed recoveries for tortious deprivation of profits at the time the recoveries are made, not by reopening the earlier years. See *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426 (1955). As Hanover points out, since it will be taxed when it recovers damages from United for both the actual and the trebled damages, to diminish the actual damages by the amount of the taxes that it would have paid had it received greater profits in the years it was damaged would be to apply a double deduction for taxation, leaving Hanover with less income than it would have had if United had not injured it. It is true that accounting for taxes in the year when damages are received rather than the year when profits were lost can change the amount of taxes the Revenue Service collects; as United shows, actual rates of taxation were much higher in some of the years when Hanover was injured than they are today. But because the statute of limitations frequently will bar the Commissioner from recomputing for earlier years, and because of the policy underlying the statute of limitations—the fact that such recomputations are immensely difficult or impossible when a long period has intervened—the rough result of not taking account of taxes for the year of injury but then taxing recovery when received seems the most satisfactory outcome. The District Court therefore did not err on this question, and the Court of Appeals should not have required a recomputation.

United contends that if Hanover had bought machines instead of leasing them, it would have had to invest its own capital in the machines. United argues that the District Court erred in computing damages because it did not properly take account of the cost of capital to

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Hanover. The District Court found that in the years in question Hanover was able to borrow money for between 2% and 2.5% per annum, and that had Hanover bought machines it would have obtained the necessary capital by borrowing at about this rate. It therefore deducted an interest component of 2.5% from the profits it thought Hanover would have earned by purchasing machines. Our review of the record convinces us that the courts below did not err in these determinations; on the basis of the determinations of fact, Hanover's damages were properly computed.[16]

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

APPENDIX TO OPINION OF THE COURT.

Excerpts From Judge Wyzanski's Opinion in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 323–325 (D. Mass. 1953).

Effects of the Leasing System.

The effect of United's leasing system as it works in practice may be examined from the viewpoints of United, of the shoe manufacturers, and of competitors potential or actual.

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[16] United also says that because Hanover's managers would have computed their capital costs differently, they would not in fact have decided to stop leasing machines and to begin purchasing them. The District Court found, however, that Hanover, had it been given the opportunity, would have bought rather than leased the machines offered by United. This finding, affirmed by the Court of Appeals, is supported by the evidence, and we do not disturb it.

For United these are the advantages. (a) United has enjoyed a greater stability of annual revenues than is customary among manufacturers of other capital goods. But this is not due exclusively to the practice of leasing as distinguished from selling. It is attributable to the effects of leasing when, as is the case with United, the lessor already has a predominant share of the market. (b) United has been able to conduct research activities more favorably than if it sold its machines outright. The leasing system, especially the service aspect of that system, has given United constant access to shoe manufacturers and their problems. This has promoted United's knowledge of their problems and has stimulated United's shoe machinery development. This research knowledge would not be diminished substantially if United's service activities covered fewer factories. But if all access to shoe factories were denied the diminution would be of great consequence to research. (c) The steadiness of revenues, attributable, as stated above, not to the leases alone, but to leases in a market dominated by the lessor, has tended to promote fairly steady appropriations to research. But these appropriations declined in the 1929 depression. Research expenditures might or might not be increased if competition were increased. The experience of United when faced with Compo's cement process suggests that declining revenues, no less than steady revenues, may promote research expenditures. (d) United has kept its leased machines in the best possible condition. (e) Under the leasing system United has enjoyed a wide distribution of machinery in a relatively narrow market. But this is merely another way of saying that United's market position, market power, lease provisions, and lease practices give it an advantage over competitors.

Upon shoe manufacturers, United's leasing system has had these effects. It has been easy for a person with modest capital and of something less than superior effi-

ciency to become a shoe manufacturer. He can get machines without buying them; his machines are serviced without separate charges; he can conveniently exchange an older United model for a new United model; he can change from one process to another; and his costs of machinery per pair of shoes produced closely approximate the machinery costs of every other manufacturer using the same machinery to produce shoes by the same process. Largely as a consequence of these factors, there were in 1950, 1,300 factories each having a daily production capacity of 3,000 pairs a day or less; 100 factories each having a capacity of 3,000 to 8,000 pairs; and 40 larger manufacturers. Many of these larger manufacturers, who collectively account for 40% of the shoe production of the United States, started in a small way and flourished under United's leasing system. Moreover the testimony in this case indicates virtually no shoe manufacturers who are dissatisfied with the present system. It cannot be said whether this absence of expressed dissatisfaction is due to lack of actual dissatisfaction, to practical men's preference for what they regard as a fair system, even if it should be monopolistic, or to fear, inertia, or reluctance to testify.

However, while United's system has made it easier to enter the shoe manufacturing industry than to enter many, perhaps most, other manufacturing industries, it has not necessarily promoted in the shoe manufacturing field the goals of a competitive economy and an open society. Without attempting to make findings that are more precise than the evidence warrants, this much can be definitely stated. If United shoe machinery were available upon a sale basis, then—

(a) Some shoe manufacturers would be able to secure credit whether by conditional sales, chattel mortgages, or other devices.

(b) Under such a system, there is no reason to suppose that a purchaser's first installment on a machine would significantly exceed the deposit now often required of a new shoe manufacturer by United.

(c) A few shoe manufacturers would be able to borrow at rates of interest comparable to the interest rates at which United borrows, or raises capital.

(d) Some shoe manufacturers would be able to provide for themselves service at a cost less than the average cost to United of supplying service to all lessees of its machines.

(e) Those manufacturers who bought United machines would not be subject, as are those manufacturers who lease United machines, to the unilateral decision of United whether or not to continue or modify those informal policies which are not written in the leases and to which United is not expressly committed for any specific future period. While there is no evidence that United plans any change in its informal policies, and while United has not heretofore proceeded to alter its informal policies on the basis of its approval or disapproval of individual manufacturers, United has not expressly committed itself to continue, for example, its 1935 plan for return of machines, its right of deduction fund, its waiver for 4 months of unit charges, or its present high standard of service. United's reserved power with respect to these matters gives it some greater degree of psychological, and some greater degree of economic control, than a seller of machinery would have.

(f) Some manufacturers who had bought machinery would find that financial and psychological considerations made them more willing than lessees would be, to dispose of already acquired United machines and to take on competitors' machines in their place.

In looking at United's leasing system from the viewpoint of potential and actual competition, it must be

confessed at the outset, that any system of selling or leasing one company's machines will, of course, impede to some extent the distribution of another company's machines. If a shoe manufacturer has already acquired one company's machinery either by outright purchase, by conditional purchase, or on lease on any terms whatsoever, the existence of that machine in the factory is a possible impediment to the marketing of a competitive machine.

Yet as already noted, a shoe manufacturer may psychologically or economically be more impeded by a leasing than by a selling system. And this general observation is buttressed by a study of features in the United leasing system which have a special deterrent effect. Though these features are stated separately, and some of them alone are important impediments, they must be appraised collectively to appreciate the full deterrent effect.

(a) The 10 year term is a long commitment.

(b) A shoe manufacturer who already has a United leased machine which can perform all the available work of a particular type may be reluctant to experiment with a competitive machine to the extent he would wish. He may hesitate to ask for permission to avoid the full capacity clause. If permission is given for an experimental period he may find the experimental period too short. Thus a competitor may not get a chance to have his machine adequately tried out by a shoe manufacturer. If a shoe manufacturer prefers a competitive machine to a United machine on hand, he may not know the exact rate at which future payments may be commuted. If he knows, he may find that a fresh outlay to make those commuted payments (which admittedly are not solely for revenue but also are for protection against competition, and which admittedly discriminate in favor of a lessee who takes a new United machine and not a competitor's machine) plus the rentals he has already

paid cost him more than if he had bought a similar machine in the first place and were now to dispose of it in trade or in a second-hand market. Thus for a maker of competitive machines he may be a less likely customer than if United had initially allowed him to buy the machine.

(c) United's lease system makes impossible a second-hand market in its own machines. This has two effects. It prevents United from suffering that kind of competition which a second-hand market offers. Also it prevents competitors from acquiring United machines with a view to copying such parts of the machines as are not patented, and with a view to experimenting with improvements without disclosing them to United.

(d) United's practice of rendering repair service only on its own machines and without separate charge has brought about a situation in which there are almost no large scale independent repair companies. Hence when a typical small shoe manufacturer is considering whether to acquire a complicated shoe machine, he must look to the manufacturer of that machine for repair service. And a competitor of United could not readily market such a complicated machine unless in addition to offering the machine he was prepared to supply service. As the experience of foreign manufacturers indicates, this has proved to be a serious stumbling block to those who have sought to compete with United.

(e) If a shoe manufacturer is deciding whether to introduce competitive machines, (either for new operations or as replacements for United machines on which the lease has not expired), he faces the effect of those decisions upon his credit under the Right of Deduction Fund. If he already has virtually all United machines, and if he replaces few of them by competitive machines, the Fund will take care of substantially all his so-called deferred charges, and may cover some of his minimum payments. This is because credit to the Fund earned

by a particular machine enures to the benefit of all leased machines in the factory, and the maximum advantage to the shoe manufacturer is to have a large number of United machines to which the credit can be applied. This advantage to the shoe manufacturer of acquiring and keeping a full line of United machines deters, though probably only mildly, the opportunities of a competing shoe manufacturer.

MR. JUSTICE STEWART, dissenting.

Hanover sued United under the Clayton Act for damages allegedly flowing from United's practice of offering its machines for lease but not for sale. Hanover did not attempt to prove as an original matter that this practice violated the antitrust laws. Instead, it relied exclusively upon § 5 (a) of the Clayton Act, 38 Stat. 731, as amended, which provides:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ." 15 U. S. C. § 16 (a).

Hanover recovered an award of treble damages solely upon the theory that the 1953 judgment and decree in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, aff'd *per curiam*, 347 U. S. 521, had established the unlawfulness of United's practice of making its machines available by lease only. So it follows, as the Court says, "[i]f the 1953 judgment is not prima facie evidence of the illegality of the practice from which

Hanover's asserted injury arose, then Hanover, having offered no other convincing evidence of illegality, should not have recovered at all." *Ante,* at 484.

I think that the 1953 judgment did not have the broad effect the Court attributes to it today. On the contrary, that judgment, it seems evident to me, held unlawful only particular kinds of leases with particular provisions, not United's general practice of leasing only.[1]

The only precedent cited by the Court for its expansive application of § 5 (a) is *Emich Motors Corp.* v. *General Motors Corp.,* 340 U. S. 558. That case dealt with the estoppel effect of a general jury verdict in a criminal case. We deal here with a civil case which was tried to a federal judge, who rendered a thoroughly considered opinion and carefully precise decree.

One section of the decree, § 2, broadly set out what the court found United's antitrust violations to be:

> "Defendant violated § 2 of the Sherman Act, 15 U. S. C. A. § 2, by monopolizing the shoe machinery trade and commerce among the several States. Defendant violated the same section of the law by monopolizing that part of the interstate trade and commerce in tacks, nails, eyelets, grommets, and hooks, which is concerned with supplying the demand for those products by shoe factories within the United States. . . ." 110 F. Supp., at 352.

Another section of the decree, § 4, clearly specified the unlawful means by which these antitrust violations had been accomplished, and United's general leasing practice was not one of those means:

> "All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred

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[1] I am not alone in this view. See *Cole* v. *Hughes Tool Co.,* 215 F. 2d 924, 932–933; *Laitram Corp.* v. *King Crab, Inc.,* 244 F. Supp. 9, 18. See also n. 2, *infra.*

payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." *Ibid.*

In addition to these two sections setting forth the violations found, the decree contained some 20 remedial sections. Section 3 enjoined the violations found in § 2. Section 6 prohibited the particular types of leases found to be unlawful in § 4. Another section of the decree, § 5, went further and provided that in the future United's machines must be offered for sale as well as for lease. But it is a commonplace that "relief, to be effective, must go beyond the narrow limits of the proven violation," *United States* v. *Gypsum Co.*, 340 U. S. 76, 90. *United States* v. *Loew's Inc.*, 371 U. S. 38, 53; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724.

I can find nothing in Judge Wyzanski's written opinion in the 1953 case to suggest that he found United's lease-only practice, as such, to be a violation of the antitrust laws or illegal in any way.[2] To the contrary, that opinion repeatedly emphasized the anticompetitive effects of the particular types of leases held illegal, and carefully explained that the purpose of requiring that customers

[2] Neither, apparently, could Judge Wyzanski. After the trial court in this action filed its opinion holding that the 1953 decree had condemned United's lease-only practice, United applied to Judge Wyzanski for a construction of his decree. While denying the application upon grounds of comity, Judge Wyzanski indicated a willingness to construe his decree if officially requested by the trial judge in the present case, Judge Sheridan. During the course of the hearing before Judge Wyzanski, he made his own views clear to government counsel:

"Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided?"

in the future be given an option to purchase was to create an eventual second-hand market in United's machines and to make the machines available to United's competitors, so that they might study and copy them. 110 F. Supp., at 349–350. The opinion specifically stated that the reason for ordering United to offer its machines for sale was *not* to widen the choices available to customers.[3]

The Court today adds as an Appendix to its opinion—like a *deus ex machina*—Judge Wyzanski's findings of fact. But it is irrelevant with respect to § 5 (a) that the 1953 findings describe United's lease-only practice, when neither the decree nor the opinion held that practice to be unlawful.

The real key to why the Court has gone astray in this case is to be found, I think, in the concluding sentence of Part I of the Court's opinion. For there the Court reveals that it is really not trying to determine what Judge Wyzanski decided in 1953, but is determining instead how this Court would decide the issues if the 1953 case were before it as an original matter today.[4]

In my view the 1953 *United Shoe* decision does not establish United's liability to Hanover. I do not reach, therefore, the other questions dealt with in the Court's opinion.

I would reverse the judgment of the Court of Appeals.

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[3] 110 F. Supp., at 349–350. The language quoted by the Court, *ante*, at 486, n. 3, is not a statement of why the District Court in 1953 ordered United to offer its machines for sale, but rather part of the court's answer to United's argument that it would be unfair to make United sell while its competitors continued only to lease. 110 F. Supp., at 350.

[4] "When the *applicable standard* for determining monopolization under § 2 *is applied to these facts*, it must be concluded that the District Court and the Court of Appeals did not err in holding that United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization in the Government's case." (Emphasis added.)

POWELL *v.* TEXAS.

APPEAL FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY, TEXAS.

No. 405. Argued March 7, 1968.—Decided June 17, 1968.

Appellant was arrested and charged with being found in a state of intoxication in a public place, in violation of Art. 477 of the Texas Penal Code. He was tried in the Corporation Court of Austin, and found guilty. He appealed to the County Court of Travis County, and after a trial *de novo*, he was again found guilty. That court made the following "findings of fact": (1) chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive use of alcohol, (2) a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism, and (3) appellant is a chronic alcoholic who is afflicted by the disease of chronic alcoholism; but ruled as a matter of law that chronic alcoholism was not a defense to the charge. The principal testimony was that of a psychiatrist, who testified that appellant, a man with a long history of arrests for drunkenness, was a "chronic alcoholic" and was subject to a "compulsion" which was "not completely overpowering," but which was "an exceedingly strong influence." *Held:* The judgment is affirmed. Pp. 517–554.

MR. JUSTICE MARSHALL, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN, concluded that:

1. The lower court's "findings of fact" were not such in any recognizable, traditional sense, but were merely premises of a syllogism designed to bring this case within the scope of *Robinson* v. *California*, 370 U. S. 660 (1962). P. 521.

2. The record here is utterly inadequate to permit the informed adjudication needed to support an important and wide-ranging new constitutional principle. Pp. 521–522.

3. There is no agreement among medical experts as to what it means to say that "alcoholism" is a "disease," or upon the "manifestations of alcoholism," or on the nature of a "compulsion." Pp. 522–526.

4. Faced with the reality that there is no known generally effective method of treatment or adequate facilities or manpower

for a full-scale attack on the enormous problem of alcoholics, it cannot be asserted that the use of the criminal process to deal with the public aspects of problem drinking can never be defended as rational. Pp. 526–530.

5. Appellant's conviction on the record in this case does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. Pp. 531–537.

(a) Appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion, and thus, as distinguished from *Robinson* v. *California, supra,* was not being punished for a mere status. P. 532.

(b) It cannot be concluded, on this record and the current state of medical knowledge, that appellant suffers from such an irresistible compulsion to drink and to get drunk in public that he cannot control his performance of these acts and thus cannot be deterred from public intoxication. In any event, this Court has never articulated a general constitutional doctrine of *mens rea,* as the development of the doctrine and its adjustment to changing conditions has been thought to be the province of the States. Pp. 535–536.

MR. JUSTICE BLACK, joined by MR. JUSTICE HARLAN, concluded:

1. Public drunkenness, which has been a crime throughout our history, is an offense in every State, and this Court certainly cannot strike down a State's criminal law because of the heavy burden of enforcing it. P. 538.

2. Criminal punishment provides some form of treatment, protects alcoholics from causing harm or being harmed by removing them from the streets, and serves some deterrent functions; and States should not be barred from using the criminal process in attempting to cope with the problem. Pp. 538–540.

3. Medical decisions based on clinical problems of diagnosis and treatment bear no necessary correspondence to the legal decision whether the overall objectives of criminal law can be furthered by imposing punishment; and States should not be constitutionally required to inquire as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was the result of a "compulsion." Pp. 540–541.

4. Crimes which require the State to prove that the defendant actually committed some proscribed act do not come within the scope of *Robinson* v. *California, supra,* which is properly limited to pure status crimes. Pp. 541–544.

5. Appellant's argument that it is cruel and unusual to punish a person who is not morally blameworthy goes beyond the Eighth Amendment's limits on the use of criminal sanctions and would create confusion and uncertainty in areas of criminal law where our understanding is not complete. Pp. 544–546.

6. Appellant's proposed constitutional rule is not only revolutionary but it departs from the premise that experience in making local laws by local people is the safest guide for our Nation to follow. Pp. 547–548.

MR. JUSTICE WHITE concluded:

While *Robinson* v. *California, supra,* would support the view that a chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or being drunk, appellant's conviction was for the different crime of being drunk in a public place; and though appellant showed that he was to some degree compelled to drink and that he was drunk at the time of his arrest, he made no showing that he was unable to stay off the streets at that time. Pp. 548–554.

Don L. Davis argued the cause for appellant, *pro hac vice.* With him on the briefs was *Tom H. Davis.*

David Robinson, Jr., argued the cause for appellee. With him on the briefs were *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.*

Peter Barton Hutt argued the cause for the American Civil Liberties Union et al., as *amici curiae,* urging reversal. With him on the brief was *Richard A. Merrill.*

Briefs of *amici curiae,* urging reversal, were filed by *Paul O'Dwyer* for the National Council on Alcoholism, and by the Philadelphia Diagnostic and Relocation Services Corp.

MR. JUSTICE MARSHALL announced the judgment of the Court and delivered an opinion in which THE CHIEF

JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN join.

In late December 1966, appellant was arrested and charged with being found in a state of intoxication in a public place, in violation of Texas Penal Code, Art. 477 (1952), which reads as follows:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was tried in the Corporation Court of Austin, Texas, found guilty, and fined $20. He appealed to the County Court at Law No. 1 of Travis County, Texas, where a trial *de novo* was held. His counsel urged that appellant was "afflicted with the disease of chronic alcoholism," that "his appearance in public [while drunk was] . . . not of his own volition," and therefore that to punish him criminally for that conduct would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge in the county court, sitting without a jury, made certain findings of fact, *infra*, at 521, but ruled as a matter of law that chronic alcoholism was not a defense to the charge. He found appellant guilty, and fined him $50. There being no further right to appeal within the Texas judicial system,[1] appellant appealed to this Court; we noted probable jurisdiction. 389 U. S. 810 (1967).

I.

The principal testimony was that of Dr. David Wade, a Fellow of the American Medical Association, duly certificated in psychiatry. His testimony consumed a total of 17 pages in the trial transcript. Five of those pages were taken up with a recitation of Dr. Wade's qualifica-

[1] Tex. Code Crim. Proc., Art. 4.03 (1966).

tions. In the next 12 pages Dr. Wade was examined by appellant's counsel, cross-examined by the State, and re-examined by the defense, and those 12 pages contain virtually all the material developed at trial which is relevant to the constitutional issue we face here. Dr. Wade sketched the outlines of the "disease" concept of alcoholism; noted that there is no generally accepted definition of "alcoholism"; alluded to the ongoing debate within the medical profession over whether alcohol is actually physically "addicting" or merely psychologically "habituating"; and concluded that in either case a "chronic alcoholic" is an "involuntary drinker," who is "powerless not to drink," and who "loses his self-control over his drinking." He testified that he had examined appellant, and that appellant is a "chronic alcoholic," who "by the time he has reached [the state of intoxication] . . . is not able to control his behavior, and [who] . . . has reached this point because he has an uncontrollable compulsion to drink." Dr. Wade also responded in the negative to the question whether appellant has "the willpower to resist the constant excessive consumption of alcohol." He added that in his opinion jailing appellant without medical attention would operate neither to rehabilitate him nor to lessen his desire for alcohol.

On cross-examination, Dr. Wade admitted that when appellant was sober he knew the difference between right and wrong, and he responded affirmatively to the question whether appellant's act of taking the first drink in any given instance when he was sober was a "voluntary exercise of his will." Qualifying his answer, Dr. Wade stated that "these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence, and this compulsion coupled with the firm belief in their mind that they are going to be able to handle it from now on causes their judgment to be somewhat clouded."

Appellant testified concerning the history of his drinking problem. He reviewed his many arrests for drunkenness; testified that he was unable to stop drinking; stated that when he was intoxicated he had no control over his actions and could not remember them later, but that he did not become violent; and admitted that he did not remember his arrest on the occasion for which he was being tried. On cross-examination, appellant admitted that he had had one drink on the morning of the trial and had been able to discontinue drinking. In relevant part, the cross-examination went as follows:

"Q. You took that one at eight o'clock because you wanted to drink?

"A. Yes, sir.

"Q. And you knew that if you drank it, you could keep on drinking and get drunk?

"A. Well, I was supposed to be here on trial, and I didn't take but that one drink.

"Q. You knew you had to be here this afternoon, but this morning you took one drink and then you knew that you couldn't afford to drink any more and come to court; is that right?

"A. Yes, sir, that's right.

"Q. So you exercised your will power and kept from drinking anything today except that one drink?

"A. Yes, sir, that's right.

"Q. Because you knew what you would do if you kept drinking, that you would finally pass out or be picked up?

"A. Yes, sir.

"Q. And you didn't want that to happen to you today?

"A. No, sir.

"Q. Not today?

"A. No, sir.

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"Q. So you only had one drink today?

"A. Yes, sir."

On redirect examination, appellant's lawyer elicited the following:

"Q. Leroy, isn't the real reason why you just had one drink today because you just had enough money to buy one drink?

"A. Well, that was just give to me.

"Q. In other words, you didn't have any money with which you could buy any drinks yourself?

"A. No, sir, that was give to me.

"Q. And that's really what controlled the amount you drank this morning, isn't it?

"A. Yes, sir.

"Q. Leroy, when you start drinking, do you have any control over how many drinks you can take?

"A. No, sir."

Evidence in the case then closed. The State made no effort to obtain expert psychiatric testimony of its own, or even to explore with appellant's witness the question of appellant's power to control the frequency, timing, and location of his drinking bouts, or the substantial disagreement within the medical profession concerning the nature of the disease, the efficacy of treatment and the prerequisites for effective treatment. It did nothing to examine or illuminate what Dr. Wade might have meant by his reference to a "compulsion" which was "not completely overpowering," but which was "an exceedingly strong influence," or to inquire into the question of the proper role of such a "compulsion" in constitutional adjudication. Instead, the State contented itself with a brief argument that appellant had no defense to the charge because he "is legally sane and knows the difference between right and wrong."

Following this abbreviated exposition of the problem before it, the trial court indicated its intention to disallow appellant's claimed defense of "chronic alcoholism." Thereupon defense counsel submitted, and the trial court entered, the following "findings of fact":

> "(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

Whatever else may be said of them, those are not "findings of fact" in any recognizable, traditional sense in which that term has been used in a court of law; they are the premises of a syllogism transparently designed to bring this case within the scope of this Court's opinion in *Robinson* v. *California*, 370 U. S. 660 (1962). Nonetheless, the dissent would have us adopt these "findings" without critical examination; it would use them as the basis for a constitutional holding that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease." *Post*, at 569.

The difficulty with that position, as we shall show, is that it goes much too far on the basis of too little knowledge. In the first place, the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. We know very little about the circumstances surrounding the drinking bout which re-

sulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases. The State put on only one witness, the arresting officer. The defense put on three—a policeman who testified to appellant's long history of arrests for public drunkenness, the psychiatrist, and appellant himself.

Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in this field states that the major difficulty in articulating a "disease concept of alcoholism" is that "alcoholism has too many definitions and disease has practically none." [2] This same author concludes that "*a disease is what the medical profession recognizes as such.*" [3] In other words, there is widespread agreement today that "alcoholism" is a "disease," for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops. Debate rages within the medical profession as to whether "alcoholism" is a separate "disease" in any meaningful biochemical, physiological or psychological sense, or whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders.[4]

Nor is there any substantial consensus as to the "manifestations of alcoholism." E. M. Jellinek, one of the outstanding authorities on the subject, identifies five

[2] E. Jellinek, The Disease Concept of Alcoholism 11 (1960).

[3] *Id.*, at 12 (emphasis in original).

[4] See, *e. g.*, Joint Information Serv. of the Am. Psychiatric Assn. & the Nat. Assn. for Mental Health, The Treatment of Alcoholism—A Study of Programs and Problems 6–8 (1967) (hereafter cited as Treatment of Alcoholism).

different types of alcoholics which predominate in the United States, and these types display a broad range of different and occasionally inconsistent symptoms.[5] Moreover, wholly distinct types, relatively rare in this country, predominate in nations with different cultural attitudes regarding the consumption of alcohol.[6] Even if we limit our consideration to the range of alcoholic symptoms more typically found in this country, there is substantial disagreement as to the manifestations of the "disease" called "alcoholism." Jellinek, for example, considers that only two of his five alcoholic types can truly be said to be suffering from "alcoholism" as a "disease," because only these two types attain what he believes to be the requisite degree of physiological dependence on alcohol.[7] He applies the label "gamma alcoholism" to "that species of alcoholism in which (1) acquired increased tissue tolerance to alcohol, (2) adaptive cell metabolism . . . , (3) withdrawal symptoms and 'craving,' i. e., physical dependence, and (4) loss of control are involved."[8] A "delta" alcoholic, on the other hand, "shows the first three characteristics of gamma alcoholism as well as a less marked form of the fourth characteristic—that is, instead of loss of control

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[5] Jellinek, *supra*, n. 2, at 35–41.

[6] For example, in nations where large quantities of wine are customarily consumed with meals, apparently there are many people who are completely unaware that they have a "drinking problem"—they rarely if ever show signs of intoxication, they display no marked symptoms of behavioral disorder, and are entirely capable of limiting their alcoholic intake to a reasonable amount—and yet who display severe withdrawal symptoms, sometimes including delirium tremens, when deprived of their daily portion of wine. M. Block, Alcoholism—Its Facets and Phases 27 (1965); Jellinek, *supra*, n. 2, at 17. See generally *id.*, at 13–32.

[7] Jellinek, *supra*, n. 2, at 40.

[8] Jellinek, *supra*, n. 2, at 37.

there is inability to abstain." [9] Other authorities approach the problems of classification in an entirely different manner and, taking account of the large role which psycho-social factors seem to play in "problem drinking," define the "disease" in terms of the earliest identifiable manifestations of any sort of abnormality in drinking patterns.[10]

Dr. Wade appears to have testified about appellant's "chronic alcoholism" in terms similar to Jellinek's "gamma" and "delta" types, for these types are largely defined, in their later stages, in terms of a strong compulsion to drink, physiological dependence and an inability to abstain from drinking. No attempt was made in the court below, of course, to determine whether Leroy Powell could in fact properly be diagnosed as a "gamma" or "delta" alcoholic in Jellinek's terms. The focus at the trial, and in the dissent here, has been exclusively upon the factors of loss of control and inability to abstain. Assuming that it makes sense to compartmentalize in this manner the diagnosis of such a formless "disease," tremendous gaps in our knowledge remain, which the record in this case does nothing to fill.

The trial court's "finding" that Powell "is afflicted with the disease of chronic alcoholism," which "destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol" covers a multitude of sins. Dr. Wade's testimony that appellant suffered from a compulsion which was an "exceedingly strong influence," but which was "not completely overpowering" is at least more carefully stated, if no less mystifying. Jellinek insists that conceptual clarity can only be achieved by distinguishing carefully between "loss of control" once an individual has commenced to drink and "inability to abstain"

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[9] *Id.*, at 38.

[10] See Block, *supra*, n. 6, at 19–49.

from drinking in the first place.[11] Presumably a person would have to display both characteristics in order to make out a constitutional defense, should one be recognized. Yet the "findings" of the trial court utterly fail to make this crucial distinction, and there is serious question whether the record can be read to support a finding of either loss of control or inability to abstain.

Dr. Wade did testify that once appellant began drinking he appeared to have no control over the amount of alcohol he finally ingested. Appellant's own testimony concerning his drinking on the day of the trial would certainly appear, however, to cast doubt upon the conclusion that he was without control over his consumption of alcohol when he had sufficiently important reasons to exercise such control. However that may be, there are more serious factual and conceptual difficulties with reading this record to show that appellant was unable to abstain from drinking. Dr. Wade testified that when appellant was sober, the act of taking the first drink was a "voluntary exercise of his will," but that this exercise of will was undertaken under the "exceedingly strong influence" of a "compulsion" which was "not completely overpowering." Such concepts, when juxtaposed in this fashion, have little meaning.

Moreover, Jellinek asserts that it cannot accurately be said that a person is truly unable to abstain from drinking unless he is suffering the physical symptoms of withdrawal.[12] There is no testimony in this record that Leroy Powell underwent withdrawal symptoms either before he began the drinking spree which resulted in the conviction under review here, or at any other time. In attempting to deal with the alcoholic's desire for drink in the absence of withdrawal symptoms, Jellinek is re-

[11] Jellinek, *supra*, n. 2, at 41–42.

[12] *Id.*, at 43.

duced to unintelligible distinctions between a "compulsion" (a "psychopathological phenomenon" which can apparently serve in some instances as the functional equivalent of a "craving" or symptom of withdrawal) and an "impulse" (something which differs from a loss of control, a craving or a compulsion, and to which Jellinek attributes the start of a new drinking bout for a "gamma" alcoholic).[13] Other scholars are equally unhelpful in articulating the nature of a "compulsion."[14]

It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter statement. This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.[15]

II.

Despite the comparatively primitive state of our knowledge on the subject, it cannot be denied that the destructive use of alcoholic beverages is one of our prin-

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[13] *Id.*, at 41–44.

Dr. Wade did not clarify matters when he testified at trial that a chronic alcoholic suffers from "the same type of compulsion" as a "compulsive eater."

[14] See, *e. g.*, Block, *supra*, n. 6, at 40, 55, 308; Treatment of Alcoholism 6–8; Note, Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 112–114 (1966).

[15] See *Washington* v. *United States*, — U. S. App. D. C. —, ———, 390 F. 2d 444, 446–456 (1967).

cipal social and public health problems.[16] The lowest current informed estimate places the number of "alcoholics" in America (definitional problems aside) at 4,000,000,[17] and most authorities are inclined to put the figure considerably higher.[18] The problem is compounded by the fact that a very large percentage of the alcoholics in this country are "invisible"—they possess the means to keep their drinking problems secret, and the traditionally uncharitable attitude of our society toward alcoholics causes many of them to refrain from seeking treatment from any source.[19] Nor can it be gainsaid that the legislative response to this enormous problem has in general been inadequate.

There is as yet no known generally effective method for treating the vast number of alcoholics in our society. Some individual alcoholics have responded to particular forms of therapy with remissions of their symptomatic dependence upon the drug. But just as there is no agreement among doctors and social workers with respect to the causes of alcoholism, there is no consensus as to why particular treatments have been effective in particular cases and there is no generally agreed-upon approach to the problem of treatment on a large scale.[20] Most psychiatrists are apparently of the opinion that alcoholism is far more difficult to treat than other forms of behavioral disorders, and some believe it is impossible

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[16] See generally Block, *supra*, n. 6, at 19–30, 43–49.

[17] See Treatment of Alcoholism 11.

[18] Block, *supra*, n. 6, at 43–44; Blum & Braunstein, Mind-altering Drugs and Dangerous Behavior: Alcohol, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 29, 30 (1967); Note, 2 Col. J. Law & Soc. Prob. 109 (1966).

[19] See Block, *supra*, n. 6, at 74–81; Note, 2 Col. J. Law & Soc. Prob. 109 (1966).

[20] See Treatment of Alcoholism 13–17.

to cure by means of psychotherapy; indeed, the medical profession as a whole, and psychiatrists in particular, have been severely criticised for the prevailing reluctance to undertake the treatment of drinking problems.[21] Thus it is entirely possible that, even were the manpower and facilities available for a full-scale attack upon chronic alcoholism, we would find ourselves unable to help the vast bulk of our "visible"—let alone our "invisible"—alcoholic population.

However, facilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country.[22] It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides. Presumably no State or city will tolerate

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[21] *Id.*, at 18–26.

[22] Encouraging pilot projects do exist. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 50–64, 82–108 (1967). But the President's Commission concluded that the "strongest barrier" to the abandonment of the current use of the criminal process to deal with public intoxication "is that there presently are no clear alternatives for taking into custody and treating those who are now arrested as drunks." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 235 (1967). Moreover, even if massive expenditures for physical plants were forthcoming, there is a woeful shortage of trained personnel to man them. One study has concluded that:

"[T]here is little likelihood that the number of workers in these fields could be sufficiently increased to treat even a large minority of problem drinkers. In California, for instance, according to the best estimate available, providing all problem drinkers with weekly contact with a psychiatrist and once-a-month contact with a social worker would require the full time work of *every* psychiatrist and *every* trained social worker in the United States." Cooperative Commission on Study of Alcoholism, Alcohol Problems 120 (1967) (emphasis in original).

such a state of affairs. Yet the medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were made available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading "hospital"—over one wing of the jailhouse.[23]

One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole. "Therapeutic civil commitment" lacks this feature; one is typically committed until one is "cured." Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic "freedom." [24]

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[23] For the inadequate response in the District of Columbia following *Easter* v. *District of Columbia*, 124 U. S. App. D. C. 33, 361 F. 2d 50 (1966), which held on constitutional and statutory grounds that a chronic alcoholic could not be punished for public drunkenness, see President's Commission on Crime in the District of Columbia, Report 486–490 (1966).

[24] Counsel for *amici curiae* ACLU et al., who has been extremely active in the recent spate of litigation dealing with public intoxication statutes and the chronic inebriate, recently told an annual meeting of the National Council on Alcoholism:

"We have not fought for two years to extract DeWitt Easter, Joe Driver, and their colleagues from jail, only to have them involuntarily committed for an even longer period of time, with no assurance of appropriate rehabilitative help and treatment. . . . The euphemistic name 'civil commitment' can easily hide nothing more than permanent incarceration. . . . I would caution those who might rush headlong to adopt civil commitment procedures and

Faced with this unpleasant reality, we are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational. The picture of the penniless drunk propelled aimlessly and endlessly through the law's "revolving door" of arrest, incarceration, release and re-arrest is not a pretty one. But before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately, no such promise has yet been forthcoming. If, in addition to the absence of a coherent approach to the problem of treatment, we consider the almost complete absence of facilities and manpower for the implementation of a rehabilitation program, it is difficult to say in the present context that the criminal process is utterly lacking in social value. This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects, and it can hardly be said with assurance that incarceration serves such purposes any better for the general run of criminals than it does for public drunks.

Ignorance likewise impedes our assessment of the deterrent effect of criminal sanctions for public drunkenness. The fact that a high percentage of American alcoholics conceal their drinking problems, not merely by avoiding public displays of intoxication but also by shunning all forms of treatment, is indicative that some powerful deterrent operates to inhibit the public revela-

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remind them that just as difficult legal problems exist there as with the ordinary jail sentence."

Quoted in Robitscher, Psychiatry and Changing Concepts of Criminal Responsibility, 31 Fed. Prob. 44, 49 (No. 3, Sept. 1967). Cf. Note, The Nascent Right to Treatment, 53 Va. L. Rev. 1134 (1967).

tion of the existence of alcoholism. Quite probably this deterrent effect can be largely attributed to the harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism. Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo, just as we presume it serves to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct.

Obviously, chronic alcoholics have not been deterred from drinking to excess by the existence of criminal sanctions against public drunkenness. But all those who violate penal laws of any kind are by definition undeterred. The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts. Certainly no effort was made at the trial of this case, beyond a monosyllabic answer to a perfunctory one-line question, to determine the effectiveness of penal sanctions in deterring Leroy Powell in particular or chronic alcoholics in general from drinking at all or from getting drunk in particular places or at particular times.

III.

Appellant claims that his conviction on the facts of this case would violate the Cruel and Unusual Punishment Clause of the Eighth Amendment as applied to the States through the Fourteenth Amendment. The primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of

punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed. See, *e. g., Trop* v. *Dulles,* 356 U. S. 86 (1958); *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947); *Weems* v. *United States,* 217 U. S. 349 (1910).[25]

Appellant, however, seeks to come within the application of the Cruel and Unusual Punishment Clause announced in *Robinson* v. *California,* 370 U. S. 660 (1962), which involved a state statute making it a crime to "be addicted to the use of narcotics." This Court held there that "a state law which imprisons a person thus afflicted [with narcotic addiction] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment . . . ." *Id.,* at 667.

On its face the present case does not fall within that holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson;* nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being "mentally ill, or a leper . . . ." *Id.,* at 666.

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[25] See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635 (1966).

Robinson so viewed brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.

It is suggested in dissent that *Robinson* stands for the "simple" but "subtle" principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Post*, at 567. In that view, appellant's "condition" of public intoxication was "occasioned by a compulsion symptomatic of the disease" of chronic alcoholism, and thus, apparently, his behavior lacked the critical element of *mens rea*. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*. The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion."

Likewise, as the dissent acknowledges, there is a substantial definitional distinction between a "status," as in *Robinson*, and a "condition," which is said to be involved in this case. Whatever may be the merits of an attempt to distinguish between behavior and a condition, it is perfectly clear that the crucial element in this case, so far as the dissent is concerned, is whether or not appellant can legally be held responsible for his

appearance in public in a state of intoxication. The only relevance of *Robinson* to this issue is that because the Court interpreted the statute there involved as making a "status" criminal, it was able to suggest that the statute would cover even a situation in which addiction had been acquired involuntarily. 370 U. S., at 667, n. 9. That this factor was not determinative in the case is shown by the fact that there was no indication of how Robinson himself had become an addict.

Ultimately, then, the most troubling aspects of this case, were *Robinson* to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility. In dissent it is urged that the decision could be limited to conduct which is "a characteristic and involuntary part of the pattern of the disease as it afflicts" the particular individual, and that "[i]t is not foreseeable" that it would be applied "in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery." *Post*, at 559, n. 2. That is limitation by fiat. In the first place, nothing in the logic of the dissent would limit its application to chronic alcoholics. If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a "compulsion" to kill, which is an "exceedingly strong influence," but "not completely overpowering." [26] Even if we limit our consideration to chronic alcoholics, it would seem impossible to confine the principle within the arbitrary bounds which the dissent seems to envision.

It is not difficult to imagine a case involving psychiatric testimony to the effect that an individual suffers

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[26] Cf. *Commonwealth* v. *Phelan*, 427 Pa. 265, 234 A. 2d 540 (1967), cert. denied, 391 U. S. 920 (1968).

from some aggressive neurosis which he is able to control when sober; that very little alcohol suffices to remove the inhibitions which normally contain these aggressions, with the result that the individual engages in assaultive behavior without becoming actually intoxicated; and that the individual suffers from a very strong desire to drink, which is an "exceedingly strong influence" but "not completely overpowering." Without being untrue to the rationale of this case, should the principles advanced in dissent be accepted here, the Court could not avoid holding such an individual constitutionally unaccountable for his assaultive behavior.

Traditional common-law concepts of personal accountability and essential considerations of federalism lead us to disagree with appellant. We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication. And in any event this Court has never articulated a general constitutional doctrine of *mens rea*.[27]

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral

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[27] The Court did hold in *Lambert* v. *California*, 355 U. S. 225 (1957), that a person could not be punished for a "crime" of omission, if that person did not know, and the State had taken no reasonable steps to inform him, of his duty to act and of the criminal penalty for failure to do so. It is not suggested either that *Lambert* established a constitutional doctrine of *mens rea*, see generally Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, or that appellant in this case was not fully aware of the prohibited nature of his conduct and of the consequences of taking his first drink.

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accountability of an individual for his antisocial deeds.[28] The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect," *Durham* v. *United States,* 94 U. S. App. D. C. 228, 241, 214 F. 2d 862, 875 (1954), would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, *e. g.,* the right-wrong test of *M'Naghten's Case.*[29] The experimentation of one jurisdiction in that field alone indicates the magnitude of the problem. See, *e. g., Carter* v. *United States,* 102 U. S. App. D. C. 227, 252 F. 2d 608 (1957); *Blocker* v. *United States,* 107 U. S. App. D. C. 63, 274 F. 2d 572 (1959); *Blocker* v. *United States,* 110 U. S. App. D. C. 41, 288 F. 2d 853 (1961) (*en banc*); *McDonald* v. *United States,* 114 U. S. App. D. C. 120, 312 F. 2d 847 (1962) (*en banc*); *Washington* v. *United States,* —— U. S. App. D. C. ——, 390 F. 2d 444 (1967). But formulating a constitutional rule would reduce, if not eliminate, that fruitful

[28] See generally Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932).

[29] 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Affirmed.

MR. JUSTICE BLACK, whom MR. JUSTICE HARLAN joins, concurring.

While I agree that the grounds set forth in MR. JUSTICE MARSHALL's opinion are sufficient to require affirmance of the judgment here, I wish to amplify my reasons for concurring.

Those who favor the change now urged upon us rely on their own notions of the wisdom of this Texas law to erect a constitutional barrier, the desirability of which is far from clear. To adopt this position would significantly limit the States in their efforts to deal with a widespread and important social problem and would do so by announcing a revolutionary doctrine of constitutional law that would also tightly restrict state power to deal with a wide variety of other harmful conduct.

I.

Those who favor holding that public drunkenness cannot be made a crime rely to a large extent on their own notions of the wisdom of such a change in the law. A great deal of medical and sociological data is cited to us in support of this change. Stress is put upon the fact that medical authorities consider alcoholism a disease and have urged a variety of medical approaches to treating it. It is pointed out that a high percentage of all arrests in America are for the crime of public drunkenness and that the enforcement of these laws constitutes a tremendous burden on the police. Then it is argued that

there is no basis whatever for claiming that to jail chronic alcoholics can be a deterrent or a means of treatment; on the contrary, jail has, in the expert judgment of these scientists, a destructive effect. All in all, these arguments read more like a highly technical medical critique than an argument for deciding a question of constitutional law one way or another.

Of course, the desirability of this Texas statute should be irrelevant in a court charged with the duty of interpretation rather than legislation, and that should be the end of the matter. But since proponents of this grave constitutional change insist on offering their pronouncements on these questions of medical diagnosis and social policy, I am compelled to add that, should we follow their arguments, the Court would be venturing far beyond the realm of problems for which we are in a position to know what we are talking about.

Public drunkenness has been a crime throughout our history, and even before our history it was explicitly proscribed by a 1606 English statute, 4 Jac. 1, c. 5. It is today made an offense in every State in the Union. The number of police to be assigned to enforcing these laws and the amount of time they should spend in the effort would seem to me a question for each local community. Never, even by the wildest stretch of this Court's judicial review power, could it be thought that a State's criminal law could be struck down because the amount of time spent in enforcing it constituted, in some expert's opinion, a tremendous burden.

Jailing of chronic alcoholics is definitely defended as therapeutic, and the claims of therapeutic value are not insubstantial. As appellee notes, the alcoholics are removed from the streets, where in their intoxicated state they may be in physical danger, and are given food, clothing, and shelter until they "sober up" and thus at least regain their ability to keep from being run over by

automobiles in the street. Of course, this treatment may not be "therapeutic" in the sense of curing the underlying causes of their behavior, but it seems probable that the effect of jail on any criminal is seldom "therapeutic" in this sense, and in any case the medical authorities relied on so heavily by appellant themselves stress that no generally effective method of curing alcoholics has yet been discovered.

Apart from the value of jail as a form of treatment, jail serves other traditional functions of the criminal law. For one thing, it gets the alcoholics off the street, where they may cause harm in a number of ways to a number of people, and isolation of the dangerous has always been considered an important function of the criminal law. In addition, punishment of chronic alcoholics can serve several deterrent functions—it can give potential alcoholics an additional incentive to control their drinking, and it may, even in the case of the chronic alcoholic, strengthen his incentive to control the frequency and location of his drinking experiences.

These values served by criminal punishment assume even greater significance in light of the available alternatives for dealing with the problem of alcoholism. Civil commitment facilities may not be any better than the jails they would replace. In addition, compulsory commitment can hardly be considered a less severe penalty from the alcoholic's point of view. The commitment period will presumably be at least as long, and it might in fact be longer since commitment often lasts until the "sick" person is cured. And compulsory commitment would of course carry with it a social stigma little different in practice from that associated with drunkenness when it is labeled a "crime."

Even the medical authorities stress the need for continued experimentation with a variety of approaches. I cannot say that the States should be totally barred from

one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem. From what I have been able to learn about the subject, it seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that *any* use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

II.

I agree with MR. JUSTICE MARSHALL that the findings of fact in this case are inadequate to justify the sweeping constitutional rule urged upon us. I could not, however, consider any findings that could be made with respect to "voluntariness" or "compulsion" controlling on the question whether a specific instance of human behavior should be immune from punishment as a constitutional matter. When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force that is nevertheless "his" except in some special sense.[1] The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible. Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was "compelled" by some elusive "irresponsible" aspect of his personality. As I have already indicated, punishment of such a defendant can clearly be justified

[1] If an intoxicated person is actually carried into the street by someone else, "he" does not do the act at all, and of course he is entitled to acquittal. *E. g., Martin* v. *State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

in terms of deterrence, isolation, and treatment. On the other hand, medical decisions concerning the use of a term such as "disease" or "volition," based as they are on the clinical problems of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment. For these reasons, much as I think that criminal sanctions should in many situations be applied only to those whose conduct is morally blameworthy, see *Morissette* v. *United States*, 342 U. S. 246 (1952), I cannot think the States should be held constitutionally required to make the inquiry as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a "compulsion." [2]

III.

The rule of constitutional law urged by appellant is not required by *Robinson* v. *California*, 370 U. S. 660 (1962). In that case we held that a person could not be punished for the mere status of being a narcotics

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[2] The need for a cautious and tentative approach has been thoroughly recognized by one of the most active workers for reform in this area, Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit. In a recent decision limiting the scope of psychiatric testimony in insanity defense cases, Judge Bazelon states:

"[I]t may be that psychiatry and the other social and behavioral sciences cannot provide sufficient data relevant to a determination of criminal responsibility no matter what our rules of evidence are. If so, we may be forced to eliminate the insanity defense altogether, or refashion it in a way which is not tied so tightly to the medical model. . . . But at least we will be able to make that decision on the basis of an informed experience. For now the writer is content to join the court in this first step." *Washington* v. *United States*, — U. S. App. D. C. —, —, n. 33, 390 F. 2d 444, 457, n. 33 (1967) (expressing the views of Chief Judge Bazelon).

addict. We explicitly limited our holding to the situation where no conduct of any kind is involved, stating:

> "We hold that a state law which imprisons a person thus afflicted as a criminal, *even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there,* inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment." 370 U. S., at 667. (Emphasis added.)

The argument is made that appellant comes within the terms of our holding in *Robinson* because being drunk in public is a mere status or "condition." Despite this many-faceted use of the concept of "condition," this argument would require converting *Robinson* into a case protecting actual behavior, a step we explicitly refused to take in that decision.

A different question, I admit, is whether our attempt in *Robinson* to limit our holding to pure status crimes, involving no conduct whatever, was a sound one. I believe it was. Although some of our objections to the statute in *Robinson* are equally applicable to statutes that punish conduct "symptomatic" of a disease, any attempt to explain *Robinson* as based solely on the lack of voluntariness encounters a number of logical difficulties.[3] Other problems raised by status crimes are in no way involved when the State attempts to punish for conduct, and these other problems were, in my view, the controlling aspects of our decision.

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[3] Although we noted in *Robinson,* 370 U. S., at 667, that narcotics addiction apparently is an illness that can be contracted innocently or involuntarily, we barred punishment for addiction even when it could be proved that the defendant had voluntarily become addicted. And we compared addiction to the status of having a common cold, a condition that most people can either avoid or quickly cure when it is important enough for them to do so.

Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes.[4] In fact, one eminent authority has found only one isolated instance, in all of Anglo-American jurisprudence, in which criminal responsibility was imposed in the absence of any act at all.[5]

The reasons for this refusal to permit conviction without proof of an act are difficult to spell out, but they are nonetheless perceived and universally expressed in our criminal law. Evidence of propensity can be considered relatively unreliable and more difficult for a defendant to rebut; the requirement of a specific act thus provides some protection against false charges. See 4 Blackstone, Commentaries 21. Perhaps more fundamental is the difficulty of distinguishing, in the absence of any conduct, between desires of the day-dream variety and fixed intentions that may pose a real threat to society; extending the criminal law to cover both types of desire would be unthinkable, since "[t]here can hardly be anyone who has never thought evil. When a desire is inhib-

[4] As Glanville Williams puts it, "[t]hat crime requires an act is *invariably* true if the proposition be read as meaning that a private thought is not sufficient to found responsibility." Williams, Criminal Law—the General Part 1 (1961). (Emphasis added.) For the requirement of some act as an element of conspiracy and attempt, see *id.*, at 631, 663, 668; R. Perkins, Criminal Law 482, 531–532 (1957).

[5] Williams, *supra*, n. 4, at 11.

ited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal." [6]

In contrast, crimes that require the State to prove that the defendant actually committed some proscribed act involve none of these special problems. In addition, the question whether an act is "involuntary" is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons, wish to regard as irrelevant. In light of all these considerations, our limitation of our *Robinson* holding to pure status crimes seems to me entirely proper.

IV.

The rule of constitutional law urged upon us by appellant would have a revolutionary impact on the criminal law, and any possible limits proposed for the rule would be wholly illusory. If the original boundaries of *Robinson* are to be discarded, any new limits too would soon fall by the wayside and the Court would be forced to hold the States powerless to punish any conduct that could be shown to result from a "compulsion," in the complex, psychological meaning of that term. The result, to choose just one illustration, would be to require recognition of "irresistible impulse" as a complete defense to any crime; this is probably contrary to present law in most American jurisdictions.[7]

The real reach of any such decision, however, would be broader still, for the basic premise underlying the argument is that it is cruel and unusual to punish a person who is not morally blameworthy. I state the proposition in this sympathetic way because I feel there is much to be said for avoiding the use of criminal sanctions in many

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[6] *Id.*, at 2.

[7] Perkins, *supra*, n. 4, at 762.

such situations. See *Morissette* v. *United States, supra.* But the question here is one of constitutional law. The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime. *E. g., United States* v. *Dotterweich,* 320 U. S. 277 (1943). The criminal law is a social tool that is employed in seeking a wide variety of goals, and I cannot say the Eighth Amendment's limits on the use of criminal sanctions extend as far as this viewpoint would inevitably carry them.

But even if we were to limit any holding in this field to "compulsions" that are "symptomatic" of a "disease," in the words of the findings of the trial court, the sweep of that holding would still be startling. Such a ruling would make it clear beyond any doubt that a narcotics addict could not be punished for "being" in possession of drugs or, for that matter, for "being" guilty of using them. A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease. More generally speaking, a form of the insanity defense would be made a constitutional requirement throughout the Nation, should the Court now hold it cruel and unusual to punish a person afflicted with any mental disease whenever his conduct was part of the pattern of his disease and occasioned by a compulsion symptomatic of the disease. Such a holding would appear to overrule *Leland* v. *Oregon,* 343 U. S. 790 (1952), where the majority opinion and the dissenting opinion in which I joined both stressed the indefensibility of imposing on the States any particular test of criminal responsibility. *Id.,* at 800–801; *id.,* at 803 (Frankfurter, J., dissenting).

The impact of the holding urged upon us would, of course, be greatest in those States which have until now

refused to accept any qualifications to the "right from wrong" test of insanity; apparently at least 30 States fall into this category.[8] But even in States which have recognized insanity defenses similar to the proposed new constitutional rule, or where comparable defenses could be presented in terms of the requirement of a guilty mind (*mens rea*), the proposed new constitutional rule would be devastating, for constitutional questions would be raised by every state effort to regulate the admissibility of evidence relating to "disease" and "compulsion," and by every state attempt to explain these concepts in instructions to the jury. The test urged would make it necessary to determine, not only what constitutes a "disease," but also what is the "pattern" of the disease, what "conditions" are "part" of the pattern, what parts of this pattern result from a "compulsion," and finally which of these compulsions are "symptomatic" of the disease. The resulting confusion and uncertainty could easily surpass that experienced by the District of Columbia Circuit in attempting to give content to its similar, though somewhat less complicated, test of insanity.[9] The range of problems created would seem totally beyond our capacity to settle at all, much less to settle wisely, and even the attempt to define these terms and thus to impose constitutional and doctrinal rigidity seems absurd in an area where our understanding is even today so incomplete.

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[8] See Model Penal Code § 4.01, at 160 (Tent. Draft No. 4, 1955).

[9] *Durham* v. *United States*, 94 U. S. App. D. C. 228, 214 F. 2d 862 (1954). Some of the enormous difficulties encountered by the District of Columbia Circuit in attempting to apply its *Durham* rule are related in H. R. Rep. No. 563, 87th Cong., 1st Sess. (1961). The difficulties and shortcomings of the *Durham* rule have been fully acknowledged by the District of Columbia Circuit itself, and in particular by the author of the *Durham* opinion. See *Washington* v. *United States*, *supra*.

V.

Perceptive students of history at an early date learned that one country controlling another could do a more successful job if it permitted the latter to keep in force the laws and rules of conduct which it had adopted for itself. When our Nation was created by the Constitution of 1789, many people feared that the 13 straggling, struggling States along the Atlantic composed too great an area ever to be controlled from one central point. As the years went on, however, the Nation crept cautiously westward until it reached the Pacific Ocean and finally the Nation planted its flag on the far-distant Islands of Hawaii and on the frozen peaks of Alaska. During all this period the Nation remembered that it could be more tranquil and orderly if it functioned on the principle that the local communities should control their own peculiarly local affairs under their own local rules.

This Court is urged to forget that lesson today. We are asked to tell the most-distant Islands of Hawaii that they cannot apply their local rules so as to protect a drunken man on their beaches and the local communities of Alaska that they are without power to follow their own course in deciding what is the best way to take care of a drunken man on their frozen soil. This Court, instead of recognizing that the experience of human beings is the best way to make laws, is asked to set itself up as a board of Platonic Guardians to establish rigid, binding rules upon every small community in this large Nation for the control of the unfortunate people who fall victim to drunkenness. It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary—

it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow. I suspect this is a most propitious time to remember the words of the late Judge Learned Hand, who so wisely said:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. Hand, The Bill of Rights 73 (1958).

I would confess the limits of my own ability to answer the age-old questions of the criminal law's ethical foundations and practical effectiveness. I would hold that *Robinson* v. *California* establishes a firm and impenetrable barrier to the punishment of persons who, whatever their bare desires and propensities, have committed no proscribed wrongful act. But I would refuse to plunge from the concrete and almost universally recognized premises of *Robinson* into the murky problems raised by the insistence that chronic alcoholics cannot be punished for public drunkenness, problems that no person, whether layman or expert, can claim to understand, and with consequences that no one can safely predict. I join in affirmance of this conviction.

MR. JUSTICE WHITE, concurring in the result.

If it cannot be a crime to have an irresistible compulsion to use narcotics, *Robinson* v. *California*, 370 U. S. 660, rehearing denied, 371 U. S. 905 (1962), I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an

addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, and so could not constitutionally be convicted for drinking, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk. The statute involved here, which aims at keeping drunks off the street for their own welfare and that of others, is not challenged on the ground that it interferes unconstitutionally with the right to frequent public places. No question is raised about applying this statute to the nonchronic drunk, who has no compulsion to drink, who need not drink to excess, and who could have arranged to do his drinking in private or, if he began drinking in public, could have removed himself at an appropriate point on the path toward complete inebriation.

The trial court said that Powell was a chronic alcoholic with a compulsion not only to drink to excess but also to frequent public places when intoxicated. Nothing in the record before the trial court supports the latter conclusion, which is contrary to common sense and to common knowledge.[1] The sober chronic alcoholic has no

[1] The trial court gave no reasons for its conclusion that Powell appeared in public due to "a compulsion symptomatic of the disease of chronic alcoholism." No facts in the record support that conclusion. The trial transcript strongly suggests that the trial judge merely adopted proposed findings put before him by Powell's counsel. The fact that those findings were of no legal relevance in the trial judge's view of the case is very significant for appraising the extent to which they represented a well-considered and well-supported judgment. For all these reasons I do not feel impelled to accept this finding, and certainly would not rest a constitutional adjudication upon it.

compulsion to be on the public streets; many chronic alcoholics drink at home and are never seen drunk in public. Before and after taking the first drink, and until he becomes so drunk that he loses the power to know where he is or to direct his movements, the chronic alcoholic with a home or financial resources is as capable as the nonchronic drinker of doing his drinking in private, of removing himself from public places and, since he knows or ought to know that he will become intoxicated, of making plans to avoid his being found drunk in public. For these reasons, I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who could be punished for driving a car but not for his disease.[2]

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[2] Analysis of this difficult case is not advanced by preoccupation with the label "condition." In *Robinson* the Court dealt with "a statute which makes the 'status' of narcotic addiction a criminal offense . . . ." 370 U. S., at 666. By precluding criminal conviction for such a "status" the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. Although the same may be said for the "condition" of being a chronic alcoholic, it cannot be said for the mere transitory state of "being drunk in public." "Being" drunk in public is not far removed in time from the acts of "getting" drunk and "going" into public, and it is not necessarily a state of any great duration. And, an isolated instance of "being" drunk in public is of relatively slight importance in the life of an individual as compared with the condition of being a chronic alcoholic. If it were necessary to distinguish between "acts" and "conditions" for purposes of the Eighth Amendment, I would adhere to the concept of "condition" implicit

The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*.[3] Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.

It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that

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in the opinion in *Robinson;* I would not trivialize that concept by drawing a nonexistent line between the man who appears in public drunk and that same man five minutes later who is then "being" drunk in public. The proper subject of inquiry is whether volitional acts brought about the "condition" and whether those acts are sufficiently proximate to the "condition" for it to be permissible to impose penal sanctions on the "condition."

[3] The opinion of MR. JUSTICE MARSHALL makes clear the limitations of our present knowledge of alcoholism and the disagreements among doctors in their description and analysis of the disease. It is also true that on the record before us there is some question whether Powell possessed that degree of compulsion which alone would satisfy one of the prerequisites I deem essential to assertion of an Eighth Amendment defense. It is nowhere disputed, however, that there are chronic alcoholics whose need to consume alcohol in large quantities is so persistent and so insistent that they are truly compelled to drink. I find it unnecessary to attempt on this record to determine whether or not Powell is such an alcoholic, for in my view his attempt to claim the Eighth Amendment fails for other reasons.

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he loses the power to control his movements and for that reason appears in public. The Eighth Amendment might also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue.

These prerequisites to the possible invocation of the Eighth Amendment are not satisfied on the record before us.[4] Whether or not Powell established that he could

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[4] A holding that a person establishing the requisite facts could not, because of the Eighth Amendment, be criminally punished for appearing in public while drunk would be a novel construction of that Amendment, but it would hardly have radical consequences. In the first place, when as here the crime charged was being drunk in a public place, only the compulsive chronic alcoholic would have a defense to both elements of the crime—for his drunkenness because his disease compelled him to drink and for being in a public place because the force of circumstances or excessive intoxication sufficiently deprived him of his mental and physical powers. The drinker who was not compelled to drink, on the other hand, although he might be as poorly circumstanced, equally intoxicated, and equally without his physical powers and cognitive faculties, could have avoided drinking in the first place, could have avoided drinking to excess, and need not have lost the power to manage his movements. Perhaps the heavily intoxicated, compulsive alcoholic who could not have arranged to avoid being in public places may not, consistent with the Eighth Amendment, be convicted for being drunk in a public place. However, it does not necessarily follow that it would be unconstitutional to convict him for committing crimes involving much greater risk to society.

Outside the area of alcoholism such a holding would not have a wide impact. Concerning drugs, such a construction of the Eighth Amendment would bar conviction only where the drug is addictive and then only for acts which are a necessary part of addiction, such as simple use. Beyond that it would preclude punishment only when the addiction to or the use of drugs caused sufficient loss of physical and mental faculties. This doctrine would not bar con-

not have resisted becoming drunk on December 19, 1966, nothing in the record indicates that he could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street. Indeed, the evidence in the record strongly suggests that Powell could have drunk at home and made plans while sober to prevent ending up in a public place. Powell had a home and wife, and if there were reasons why he had to drink in public or be drunk there, they do not appear in the record.

Also, the only evidence bearing on Powell's condition at the time of his arrest was the testimony of the arresting officer that appellant staggered, smelled of alcohol, and was "very drunk." Powell testified that he had no clear recollection of the situation at the time of his arrest. His testimony about his usual condition when drunk is no substitute for evidence about his condition at the time of his arrest. Neither in the medical testimony nor elsewhere is there any indication that Powell had reached such a state of intoxication that he had lost the ability to comprehend what he was doing or where he was. For all we know from this record, Powell at the time knew precisely where he was, retained the power to stay off or leave the streets, and simply preferred to be there rather than elsewhere.

It is unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place. For the purposes of this case, it is necessary to say only that Powell showed nothing more than that he was to some degree compelled

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viction of a heroin addict for being under the influence of heroin in a public place (although other constitutional concepts might be relevant to such a conviction), or for committing other criminal acts.

to drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question.[5]

Because Powell did not show that his conviction offended the Constitution, I concur in the judgment affirming the Travis County court.

MR. JUSTICE FORTAS, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART join, dissenting.

Appellant was charged with being found in a state of intoxication in a public place. This is a violation of Article 477 of the Texas Penal Code, which reads as follows:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was tried in the Corporation Court of Austin, Texas. He was found guilty and fined $20. He appealed to the County Court at Law No. 1 of Travis County, Texas, where a trial *de novo* was held. Appellant was defended by counsel who urged that appellant was "afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol; his appear-

[5] I do not question the power of the State to remove a helplessly intoxicated person from a public street, although against his will, and to hold him until he has regained his powers. The person's own safety and the public interest require this much. A statute such as the one challenged in this case is constitutional insofar as it authorizes a police officer to arrest any seriously intoxicated person when he is encountered in a public place. Whether such a person may be charged and convicted for violating the statute will depend upon whether he is entitled to the protection of the Eighth Amendment.

ance in public in that condition is not of his own volition, but a compulsion symptomatic of the disease of chronic alcoholism." Counsel contended that to penalize appellant for public intoxication would be to inflict upon him cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

At the trial in the county court, the arresting officer testified that he had observed appellant in the 2000 block of Hamilton Street in Austin; that appellant staggered when he walked; that his speech was slurred; and that he smelled strongly of alcohol. He was not loud or boisterous; he did not resist arrest; he was cooperative with the officer.

The defense established that appellant had been convicted of public intoxication approximately 100 times since 1949, primarily in Travis County, Texas. The circumstances were always the same: the "subject smelled strongly of alcoholic beverages, staggered when walking, speech incoherent." At the end of the proceedings, he would be fined: "down in Bastrop County, it's $25.00 down there, and it's $20.00 up here [in Travis County]." Appellant was usually unable to pay the fines imposed for these offenses, and therefore usually has been obliged to work the fines off in jail. The statutory rate for working off such fines in Texas is one day in jail for each $5 of fine unpaid. Texas Code Crim. Proc., Art. 43.09.

Appellant took the stand. He testified that he works at a tavern shining shoes. He makes about $12 a week which he uses to buy wine. He has a family, but he does not contribute to its support. He drinks wine every day. He gets drunk about once a week. When he gets drunk, he usually goes to sleep, "mostly" in public places such as the sidewalk. He does not disturb the peace or interfere with others.

The defense called as a witness Dr. David Wade, a Fellow of the American Medical Association and a former President of the Texas Medical Association. Dr. Wade is a qualified doctor of medicine, duly certificated in psychiatry. He has been engaged in the practice of psychiatry for more than 20 years. During all of that time he has been especially interested in the problem of alcoholism. He has treated alcoholics; lectured and written on the subject; and has observed the work of various institutions in treating alcoholism. Dr. Wade testified that he had observed and interviewed the appellant. He said that appellant has a history of excessive drinking dating back to his early years; that appellant drinks only wine and beer; that "he rarely passes a week without going on an alcoholic binge"; that "his consumption of alcohol is limited only by his finances, and when he is broke, he makes an effort to secure alcohol by getting his friends to buy alcohol for him"; that he buys a "fifty cent bottle" of wine, always with the thought that this is all he will drink; but that he ends by drinking all he can buy until he "is . . . passed out in some joint or out on the sidewalk." According to Dr. Wade, appellant "has never engaged in any activity that is destructive to society or to anyone except himself." He has never received medical or psychiatric treatment for his drinking problem. He has never been referred to Alcoholics Anonymous, a voluntary association for helping alcoholics, nor has he ever been sent to the State Hospital.

Dr. Wade's conclusion was that "Leroy Powell is an alcoholic and that his alcoholism is in a chronic stage." Although the doctor responded affirmatively to a question as to whether the appellant's taking the first drink on any given occasion is "a voluntary exercise of will," his testimony was that "we must take into account" the fact that chronic alcoholics have a "compulsion" to drink which "while not completely overpowering, is a

very strong influence, an exceedingly strong influence," and that this compulsion is coupled with the "firm belief in their mind that they are going to be able to handle it from now on." It was also Dr. Wade's opinion that appellant "has an uncontrollable compulsion to drink" and that he "does not have the willpower [to resist the constant excessive consumption of alcohol or to avoid appearing in public when intoxicated] nor has he been given medical treatment to enable him to develop this willpower."

The trial judge in the county court, sitting without a jury, made the following findings of fact:

> "(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism." [1]

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[1] I do not understand the relevance of our knowing "very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem." (Opinion of MARSHALL, J., *ante*, at 521–522). We do not "traditionally" sit as a trial court, much less as a finder of fact. I submit that we must accept the findings of the trial court as they were made and not as the members of this Court would have made them had they sat as triers of fact. I would add, lest I create a misunderstanding, that I do not suggest in this opinion that Leroy Powell had a constitutional right, based upon the evidence adduced at his trial, to the findings of fact that were made by the county court; only that once such findings were in fact made, it became the duty of the trial court to apply the relevant legal principles and to declare that appellant's conviction would be constitutionally invalid. See *infra*, at 567–570.

I confess, too, that I do not understand the relevance of our knowing very little "about alcoholism itself," given what we do

The court then rejected appellant's constitutional defense, entering the following conclusion of law:

> "(1) The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code."

The court found appellant guilty as charged and increased his fine to $50. Appellant did not have the right to appeal further within the Texas judicial system. Tex. Code Crim. Proc., Art. 4.03. He filed a jurisdictional statement in this Court.

I.

The issue posed in this case is a narrow one. There is no challenge here to the validity of public intoxication statutes in general or to the Texas public intoxication statute in particular. This case does not concern the infliction of punishment upon the "social" drinker—or upon anyone other than a "chronic alcoholic" who, as the trier of fact here found, cannot "resist the constant, excessive consumption of alcohol." Nor does it relate to any offense other than the crime of public intoxication.

The sole question presented is whether a criminal penalty may be imposed upon a person suffering the disease of "chronic alcoholism" for a condition—being "in a state of intoxication" in public—which is a characteristic part of the pattern of his disease and which, the trial court found, was not the consequence of appellant's volition but of "a compulsion symptomatic of the disease of chronic alcoholism." We must consider whether the Eighth Amendment, made applicable to the States through the

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know—that findings such as those made in this case are, in the view of competent medical authorities, perfectly plausible. See *infra*, at 560–562.

Fourteenth Amendment, prohibits the imposition of this penalty in these rather special circumstances as "cruel and unusual punishment." This case does not raise any question as to the right of the police to stop and detain those who are intoxicated in public, whether as a result of the disease or otherwise; or as to the State's power to commit chronic alcoholics for treatment. Nor does it concern the responsibility of an alcoholic for criminal *acts*. We deal here with the mere *condition* of being intoxicated in public.[2]

II.

As I shall discuss, consideration of the Eighth Amendment issue in this case requires an understanding of "the disease of chronic alcoholism" with which, as the trial court found, appellant is afflicted, which has destroyed his "will power to resist the constant, excessive consumption of alcohol," and which leads him to "appear in public [not] by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." It is true, of course, that there is a great deal that remains to be discovered about chronic alcoholism. Although many aspects of the disease remain obscure, there are some hard facts—medical and, especially, legal facts—that are accessible to us and that provide a context in which the instant case may be analyzed. We are similarly woefully deficient in our medical, diagnostic, and therapeutic

[2] It is not foreseeable that findings such as those which are decisive here—namely that the appellant's being intoxicated in public was a part of the pattern of his disease and due to a compulsion symptomatic of that disease—could or would be made in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery. Such offenses require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism. If an alcoholic should be convicted for criminal conduct which is not a characteristic and involuntary part of the pattern of the disease as it afflicts him, nothing herein would prevent his punishment.

knowledge of mental disease and the problem of insanity; but few would urge that, because of this, we should totally reject the legal significance of what we do know about these phenomena.

Alcoholism [3] is a major problem in the United States.[4] In 1956 the American Medical Association for the first time designated alcoholism as a major medical problem and urged that alcoholics be admitted to general hospitals for care.[5] This significant development marked the acceptance among the medical profession of the "disease concept of alcoholism." [6] Although there is some prob-

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[3] The term has been variously defined. The National Council on Alcoholism has defined "alcoholic" as "a person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." The American Medical Association has defined alcoholics as "those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning."

For other common definitions of alcoholism, see Keller, Alcoholism: Nature and Extent of the Problem, in Understanding Alcoholism, 315 Annals 1, 2 (1958); O. Diethelm, Etiology of Chronic Alcoholism 4 (1955); T. Plaut, Alcohol Problems—A Report to the Nation by the Cooperative Commission on the Study of Alcoholism 39 (1967) (hereafter cited as Plaut); Aspects of Alcoholism 9 (1963) (published by Roche Laboratories); The Treatment of Alcoholism—A Study of Programs and Problems 8 (1967) (published by the Joint Information Service of the American Psychiatric Association and the National Association for Mental Health) (hereafter cited as The Treatment of Alcoholism); 2 R. Cecil & R. Loeb, A Textbook of Medicine 1620, 1625 (1959).

[4] It ranks among the top four public health problems of the country. M. Block, Alcoholism—Its Facets and Phases (1962).

[5] American Medical Association: Report of Reference Committee on Medical Education and Hospitals, Proceedings of the House of Delegates, Seattle, Wash., Nov. 27–29, 1956, p. 33; 163 J. A. M. A. 52 (1957).

[6] See generally E. Jellinek, The Disease Concept of Alcoholism (1960).

lem in defining the concept, its core meaning, as agreed by authorities, is that alcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological make-up and history of the individual, cannot be controlled by him. Today most alcohologists and qualified members of the medical profession recognize the validity of this concept. Recent years have seen an intensification of medical interest in the subject.[7] Medical groups have become active in educating the public, medical schools, and physicians in the etiology, diagnosis, and treatment of alcoholism.[8]

Authorities have recognized that a number of factors may contribute to alcoholism. Some studies have pointed to physiological influences, such as vitamin deficiency, hormone imbalance, abnormal metabolism, and hereditary proclivity. Other researchers have found more convincing a psychological approach, emphasizing early environment and underlying conflicts and tensions. Numerous studies have indicated the influence of socio-cultural factors. It has been shown, for example, that the incidence of alcoholism among certain ethnic groups is far higher than among others.[9]

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[7] See, *e. g.*, H. Haggard & E. Jellinek, Alcohol Explored (1942); O. Diethelm, Etiology of Chronic Alcoholism (1955); A. Ullman, To Know the Difference (1960); D. Pittman & C. Snyder, Society, Culture, and Drinking Patterns (1962).

[8] See Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 113 (1966).

[9] See Alcohol and Alcoholism 24–28 (published by the Public Health Service of the U. S. Department of Health, Education, and Welfare). "Although many interesting pieces of evidence have been assembled, it is not yet known why a small percentage of those who use alcohol develop a destructive affinity for it." The Treatment of Alcoholism 9.

The manifestations of alcoholism are reasonably well identified. The late E. M. Jellinek, an eminent alcohologist, has described five discrete types commonly found among American alcoholics.[10] It is well established that alcohol may be habituative and "can be physically addicting." [11] It has been said that "the main point for the nonprofessional is that alcoholism is not within the control of the person involved. He is not willfully drinking." [12]

Although the treatment of alcoholics has been successful in many cases,[13] physicians have been unable to discover any single treatment method that will invariably produce satisfactory results. A recent study of available treatment facilities concludes as follows: [14]

> "Although numerous kinds of therapy and intervention appear to have been effective with various kinds of problem drinkers, the process of matching patient and treatment method is not yet highly developed. There is an urgent need for continued experimentation, for modifying and improving exist-

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[10] See E. Jellinek, The Disease Concept of Alcoholism 35–41 (1960).

[11] Alcoholism 3 (1963) (published by the Public Health Service of the U. S. Department of Health, Education, and Welfare). See also Bacon, Alcoholics Do Not Drink, in Understanding Alcoholism, 315 Annals 55–64 (1958).

[12] A. Ullman, To Know the Difference 22 (1960).

[13] In response to the question "can a chronic alcoholic be medically treated and returned to society as a useful citizen?" Dr. Wade testified as follows:

"We believe that it is possible to treat alcoholics, and we have large numbers of individuals who are now former alcoholics. They themselves would rather say that their condition has been arrested and that they remain alcoholics, that they are simply living a pattern of life, through the help of medicine or whatever source, that enables them to refrain from drinking and enables them to combat the compulsion to drink."

[14] The Treatment of Alcoholism 13.

> ing treatment methods, for developing new ones, and for careful and well-designed evaluative studies. Most of the facilities that provide services for alcoholics have made little, if any, attempt to determine the effectiveness of the total program or of its components."

Present services for alcoholics include state and general hospitals, separate state alcoholism programs, outpatient clinics, community health centers, general practitioners, and private psychiatric facilities.[15] Self-help organizations, such as Alcoholics Anonymous, also aid in treatment and rehabilitation.[16]

The consequences of treating alcoholics, under the public intoxication laws, as criminals can be identified with more specificity. Public drunkenness is punished as a crime, under a variety of laws and ordinances, in every State of the Union.[17] The Task Force on Drunkenness of the President's Commission on Law Enforcement and Administration of Justice has reported that "[t]wo million arrests in 1965—one of every three arrests in America—were for the offense of public drunkenness." [18] Drunkenness offenders make up a large percentage of the population in short-term penal institutions.[19] Their arrest and processing place a tremendous burden upon the police, who are called upon to spend a large amount of time

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[15] *Id.*, at 13–26. See also Alcohol and Alcoholism 31–40; Plaut 53–85.

[16] See A. Ullman, To Know the Difference 173–191 (1960).

[17] For the most part these laws and ordinances, like Article 477 of the Texas Penal Code, cover the offense of being drunk in a public place. See Task Force Report: Drunkenness 1 (1967) (published by The President's Commission on Law Enforcement and Administration of Justice) (hereafter cited as Task Force Report).

[18] *Ibid.*

[19] See Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 110 (1966).

in arresting for public intoxication and in appearing at trials for public intoxication, and upon the entire criminal process.[20]

It is not known how many drunkenness offenders are chronic alcoholics, but "[t]here is strong evidence . . . that a large number of those who are arrested have a lengthy history of prior drunkenness arrests." [21] "There are instances of the same person being arrested as many as forty times in a single year on charges of drunkenness, and every large urban center can point to cases of individuals appearing before the courts on such charges 125, 150, or even 200 times in the course of a somewhat longer period." [22]

It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a "revolving door"—leading from arrest on the street through a brief, unprofitable sojourn in jail, back to the street and, eventually, another arrest.[23] The jails, overcrowded and put to a use for which they are not suit-

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[20] See Task Force Report 3–4.

[21] *Id.*, at 1.

[22] F. Allen, The Borderland of Criminal Justice 8 (1964). It does not, of course, necessarily follow from the frequency of his arrests that a person is a chronic alcoholic.

[23] See D. Pittman & C. Gordon, Revolving Door: A Study of the Chronic Police Case Inebriate (1958). See also Pittman, Public Intoxication and the Alcoholic Offender in American Society, Appendix A to Task Force Report.

Dr. Wade answered each time in the negative when asked:

"Is a chronic alcoholic going to be rehabilitated by simply confining him in jail without medical attention?

"Would putting a chronic alcoholic in jail operate to lessen his desire for alcohol when he is released?

"Would imposing a monetary fine on a chronic alcoholic operate to lessen his desire for alcohol?"

able, have a destructive effect upon alcoholic inmates.[24]

Finally, most commentators, as well as experienced judges,[25] are in agreement that "there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the enforcement of the laws against drunkenness." [26]

> "If all of this effort, all of this investment of time and money, were producing constructive results, then we might find satisfaction in the situation despite its costs. But the fact is that this activity accomplishes little that is fundamental. No one can seriously suggest that the threat of fines and jail sentences actually deters habitual drunkenness or alcoholic addiction. . . . Nor, despite the heroic efforts being made in a few localities, is there much reason to suppose that any very effective measures of cure and therapy can or will be administered in the jails. But the weary process continues, to the detriment of the total performance of the law-enforcement function." [27]

III.

It bears emphasis that these data provide only a context for consideration of the instant case. They should not dictate our conclusion. The questions for this Court are not settled by reference to medicine or penology. Our task is to determine whether the principles embodied in the Constitution of the United States place any limitations upon the circumstances under which punishment

[24] See, *e. g.*, MacCormick, Correctional Views on Alcohol, Alcoholism, and Crime, 9 Crime & Delin. 15 (1963).

[25] See, *e. g.*, Murtagh, Arrests for Public Intoxication, 35 Fordham L. Rev. 1 (1966).

[26] M. Guttmacher & H. Weihofen, Psychiatry and the Law 319 (1952).

[27] F. Allen, The Borderland of Criminal Justice 8–9 (1964).

may be inflicted, and, if so, whether, in the case now before us, those principles preclude the imposition of such punishment.

It is settled that the Federal Constitution places some substantive limitation upon the power of state legislatures to define crimes for which the imposition of punishment is ordered. In *Robinson* v. *California*, 370 U. S. 660 (1962), the Court considered a conviction under a California statute making it a criminal offense for a person to "be addicted to the use of narcotics." At Robinson's trial, it was developed that the defendant had been a user of narcotics. The trial court instructed the jury that "[t]o be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms." *Id.*, at 662–663.

This Court reversed Robinson's conviction on the ground that punishment under the law in question was cruel and unusual, in violation of the Eighth Amendment of the Constitution as applied to the States through the Fourteenth Amendment. The Court noted that narcotic addiction is considered to be an illness and that California had recognized it as such. It held that the State could not make it a crime for a person to be ill.[28] Although Robinson had been sentenced to only 90 days in prison for his offense, it was beyond the power of the State to prescribe such punishment. As MR. JUSTICE STEWART, speaking for the Court, said: "[e]ven one day

[28] "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." 370 U. S., at 678 (DOUGLAS, J., concurring).

in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U. S., at 667.

Robinson stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. In all probability, Robinson at some time before his conviction elected to take narcotics. But the crime as defined did not punish this conduct.[29] The statute imposed a penalty for the offense of "addiction"—a condition which Robinson could not control. Once Robinson had become an addict, he was utterly powerless to avoid criminal guilt. He was powerless to choose not to violate the law.

In the present case, appellant is charged with a crime composed of two elements—being intoxicated and being found in a public place while in that condition. The crime, so defined, differs from that in *Robinson*. The statute covers more than a mere status.[30] But the essen-

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[29] The Court noted in *Robinson* that narcotic addiction "is apparently an illness which may be contracted innocently or involuntarily." *Id.*, at 667. In the case of alcoholism it is even more likely that the disease may be innocently contracted, since the drinking of alcoholic beverages is a common activity, generally accepted in our society, while the purchasing and taking of drugs are crimes. As in *Robinson*, the State has not argued here that Powell's conviction may be supported by his "voluntary" action in becoming afflicted.

[30] In *Robinson*, we distinguished between punishment for the "status" of addiction and punishment of an "act":

"This statute . . . is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the 'status'

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tial constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid. The trial judge sitting as trier of fact found, upon the medical and other relevant testimony, that Powell is a "chronic alcoholic." He defined appellant's "chronic alcoholism" as "a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol." He also found that "a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." I read these findings to mean that appellant was powerless to avoid drinking; that having taken his first drink, he had "an uncontrollable compulsion to drink" to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places.[31]

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of narcotic addition a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there." *Id.*, at 666.

[31] I also read these findings to mean that appellant's disease is such that he cannot be deterred by Article 477 of the Texas Penal Code from drinking to excess and from appearing in public while intoxicated. See n. 23, *supra*.

Finally, contrary to the views of MR. JUSTICE WHITE, *ante*, at 549–551, I believe these findings must fairly be read to encompass the facts that my Brother WHITE agrees would require reversal, that is, that for appellant Powell, "resisting drunkenness" and "avoiding public places when intoxicated" on the occasion in question were "impossible." Accordingly, in MR. JUSTICE WHITE's words, "[the] statute is in effect a law which bans a single act for which [he] may not be convicted under the Eighth Amendment—the act of getting drunk." In my judgment, the findings amply show that "it was not feasible for [Powell] to have made arrangements to prevent his being in public when drunk and that his extreme drunkennesss sufficiently deprived him of his faculties on the occasion in issue."

Article 477 of the Texas Penal Code is specifically directed to the accused's presence while in a state of intoxication, "in any public place, or at any private house except his own." This is the essence of the crime. Ordinarily when the State proves such presence in a state of intoxication, this will be sufficient for conviction, and the punishment prescribed by the State may, of course, be validly imposed. But here the findings of the trial judge call into play the principle that a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease. This principle, narrow in scope and applicability, is implemented by the Eighth Amendment's prohibition of "cruel and unusual punishment," as we construed that command in *Robinson*. It is true that the command of the Eighth Amendment and its antecedent provision in the Bill of Rights of 1689 were initially directed to the type and degree of punishment inflicted.[32] But in *Robinson* we recognized that "the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." 370 U. S., at 676 (MR. JUSTICE DOUGLAS, concurring).[33]

The findings in this case, read against the background of the medical and sociological data to which I have referred, compel the conclusion that the infliction upon appellant of a criminal penalty for being intoxicated in

[32] See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86 (1958); *Weems* v. *United States*, 217 U. S. 349 (1910). See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635, 636–645 (1966).

[33] Convictions of chronic alcoholics for violations of public intoxication statutes have been invalidated on Eighth Amendment grounds in two circuits. See *Easter* v. *District of Columbia*, 124 U. S. App. D. C. 33, 361 F. 2d 50 (1966); *Driver* v. *Hinnant*, 356 F. 2d 761 (C. A. 4th Cir. 1966).

a public place would be "cruel and inhuman punishment" within the prohibition of the Eighth Amendment. This conclusion follows because appellant is a "chronic alcoholic" who, according to the trier of fact, cannot resist the "constant excessive consumption of alcohol" and does not appear in public by his own volition but under a "compulsion" which is part of his condition.

I would reverse the judgment below.

Syllabus.

AMERICAN COMMERCIAL LINES, INC., ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 797. Argued April 23–24, 1968.—Decided June 17, 1968.*

Since 1953 ingot molds have moved almost exclusively by combination barge-truck service from Neville Island and Pittsburgh, Pa., to Steelton, Ky. The overall service charge since 1960 has been $5.11 per ton. In 1963 appellees Pennsylvania Railroad and the Louisville & Nashville Railroad, in order to compete for this traffic, lowered their joint rate from $11.86 to $5.11 per ton. The barge lines, joined by intervening trucking interests, protested to the Interstate Commerce Commission (ICC) that the new railroad rate impaired or destroyed the barge-truck service's "inherent advantage" and thus violated § 15a (3) of the Interstate Commerce Act and the National Transportation Policy. Under § 15a (3) a carrier's rates "shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." The congressional intent stated in the National Transportation Policy is to provide for fair regulation of all transportation modes subject to the Act, administered so as to preserve "the inherent advantage of each." The ICC found that the per ton fully distributed cost of moving the traffic was $7.59 for the railroads and $5.19 for the barge-truck service, and the long-term out-of-pocket cost was $4.69 for the railroads and estimated to be about $5.19 for the barge-truck service and in any event higher than $4.69. Uncontroverted shipper testimony was that price solely determined which service would be used, but that all traffic would go to the railroads if their rates were the same as those of the barge-truck combination. The ICC rejected the railroads' contention that out-of-pocket costs should be the

*Together with No. 804, *American Trucking Assns., Inc., et al.* v. *Louisville & Nashville Railroad Co. et al.*, No. 808, *American Waterways Operators, Inc.* v. *Louisville & Nashville Railroad Co. et al.*, and No. 809, *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co. et al.*, also on appeal from the same court.

basis on which "inherent advantage" should be determined, observing that it had regularly viewed fully distributed costs as the proper basis for determining the lower cost mode of two competing modes for particular traffic; that legislative history indicated that Congress intended fully distributed costs to be the basis for comparison when it inserted into § 15a (3) the reference to the National Transportation Policy; and that a rulemaking proceeding was pending involving the whole question of costing in situations involving intermodal competition and that a radical departure from the fully distributed cost norm would not be warranted on the record before it. Utilizing the fully distributed costs comparison to determine inherent advantage, the ICC ordered the railroads' rate canceled, having concluded that such a rate would infringe upon the barge-truck carriers' ability competitively to assert their inherent advantage because it would compel them to go well below their own fully distributed costs to recapture the traffic from the railroads. The District Court reversed. After analyzing this Court's opinion construing § 15a (3) in *ICC* v. *New York, N. H. & H. R. Co.*, 372 U. S. 744 (1963) (*"New Haven"*), and the legislative history of § 15a (3), it concluded that the ICC order contravened the Act and held that Congress intended that inherent advantage should be determined in most cases by a comparison of out-of-pocket costs and that therefore competing carriers should generally be free to offer any rates as long as they were compensatory. It also held that the ICC had not articulated the reasons for deciding that inherent advantage should be determined by reference to fully distributed costs. *Held:* The ICC properly exercised its discretion in disallowing the rate reduction proposed by the appellee railroads as inconsistent with § 15a (3) of the Interstate Commerce Act and the National Transportation Policy and adequately articulated its reasons for disallowing the proposed rate. Pp. 579–594.

(a) Before enacting § 15a (3), following railroad complaints that the ICC had maintained artificially high rates to protect competing modes from being driven out of business by the railroads, Congress rejected language that would have required looking only to the effect of a rate reduction on the proponent carrier. "The principal reason for [the reference to the National Transportation Policy] . . . was to emphasize the power of the Commission to prevent the railroads from destroying or impairing the inherent advantages of other modes." *New Haven, supra,* at 758. Pp. 579–582.

(b) The District Court erred in concluding from the *New Haven* decision and its own interpretation of § 15a (3) that the ICC had the burden of justifying a departure from using out-of-pocket cost to determine inherent cost advantage, since *New Haven* did not require any particular method of costing to be used as a standard. Pp. 583–584.

(c) Section 15a (3) in conjunction with the National Transportation Policy was not enacted to enable the railroads to price their services in such a way as to obtain the maximum revenue therefrom. P. 589.

(d) The ICC has the authority to exercise its informed judgment in determining the method of costing which is to be used under § 15a (3), and has reasonable latitude to determine where and how it will resolve that complex issue. Pp. 590–592.

(e) The District Court erred in not recognizing the ICC's ample authority to decline to deal with the railroads' broad contentions in this individual case pending its evaluation in the context of a rulemaking proceeding of the effects on the transportation industry as a whole of the alternatives of a departure from the fully distributed cost standard which the ICC had been using in passing upon individual rate reductions. See *Permian Basin Area Rate Cases*, 390 U. S. 747. Pp. 590–593.

(f) The ICC was not required to explain why it permitted out-of-pocket ratemaking for unregulated carriers and not where the competition was regulated, since § 15a (3) by its own terms applies only to regulated carriers. P. 593.

(g) The ICC adequately explained how the railroads' rate would impair the barge-truck inherent advantage, for as the ICC pointed out, the ratemaking principle proposed by the railroads would have permitted them to capture all the traffic presently handled by the barge-truck combination because the railroads' out-of-pocket costs were lower than those of the barge-truck service. Pp. 593–594.

268 F. Supp. 71, reversed and remanded.

Leonard S. Goodman and *Harry C. Ames, Jr.*, argued the cause for appellants in all cases. With *Mr. Goodman* on the brief for appellant in No. 809 were *Robert W. Ginnane* and *Fritz R. Kahn.* With *Mr. Ames* on the brief for appellants in No. 797 were *J. Raymond Clark,*

Robert E. Webb, and *T. Randolph Buck*. *Peter T. Beardsley, Bryce Rea, Jr., Thomas M. Knebel*, and *Nuel D. Belnap* filed briefs for appellants in No. 804. *A. Alvis Layne* and *Robert L. Wright* filed briefs for appellant in No. 808.

Daniel M. Friedman argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Turner*, and *Howard E. Shapiro*. *Carl Helmetag, Jr.*, argued the cause for appellee railroads in all cases. With him on the brief were *Stanfield Johnson, Elbert R. Leigh, James H. McGlothlin, James A. Bistline, Thormund A. Miller, William M. Moloney, Harry J. Breithaupt, Donal L. Turkal, Joseph E. Stopher*, and *R. Lee Blackwell*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The basic issue in these cases is whether the action of the Interstate Commerce Commission in disallowing a rate reduction proposed by the appellee railroads, 326 I. C. C. 77 (1965), was consistent with the provisions of § 15a (3) of the Interstate Commerce Act, 49 U. S. C. § 15a (3), added by 72 Stat. 572 (1958), which governs ratemaking in situations involving intermodal competition. A subsidiary but related issue is whether the Commission adequately articulated its reasons for disallowing the proposed rate. A statutory three-judge court, upon appeal of the Commission's decision by the appellee railroads, held that the Commission's decision was erroneous on both of the foregoing grounds. 268 F. Supp. 71 (D. C. W. D. Ky. 1967). Because of the importance of § 15a (3) as the primary guide to ICC resolution of rate controversies involving intermodal competition, we noted probable jurisdiction of the appeal taken by the Commission and the competing carriers from the decision of the Dis-

trict Court.[1] 389 U. S. 1032 (1968). For the reasons detailed below, we conclude that the District Court erred in its rejection of the Commission's decision, and the grounds on which it was based, and we reverse.

I.

Since 1953 the movement of ingot molds from Neville Island and Pittsburgh, Pennsylvania, to Steelton, Kentucky, has been almost exclusively by combination barge-truck service, and since 1960 the overall charge for this service has been $5.11 per ton. In 1963 the Pennsylvania Railroad and the Louisville & Nashville Railroad lowered their joint rate for this same traffic from $11.86 to $5.11 per ton. The competing barge lines, joined by intervening trucking interests, protested to the ICC that the new railroad rate violated § 15a (3) of the Interstate Commerce Act because it impaired or destroyed the "inherent advantage" [2] then enjoyed by the barge-truck service. The Commission thereupon undertook an investigation of the rate reduction.

In the course of the administrative proceedings that followed, the ICC made the following factual findings about which there is no real dispute among the parties. The fully distributed cost [3] to the railroads of this service

[1] The United States, a statutory defendant in the District Court, supported the railroads' position there and has participated in support of them in the proceedings before this Court.

[2] The term "inherent advantage" comes from the National Transportation Policy, 49 U. S. C. preceding § 1, and is incorporated by reference into § 15a (3) of the Interstate Commerce Act. The meaning of the term is the central issue in these cases and will be discussed in considerable detail, *infra*, at 579–594.

[3] Fully distributed costs are defined broadly by the ICC as the "out-of-pocket costs plus a revenue-ton and revenue ton-mile distribution of the constant costs, including deficits, [that] indicate the revenue necessary to a fair return on the traffic, disregarding ability to pay." *New Automobiles in Interstate Commerce*, 259 I. C. C. 475, 513 (1945).

was $7.59 per ton, and the "long term out-of-pocket costs" [4] were $4.69 per ton. The fully distributed cost to the barge-truck service [5] was $5.19 per ton.[6] The out-of-pocket cost [7] of the barge-truck service was not separately computed, but was estimated, without contradiction, to be approximately the same as the fully distributed cost and higher, in any event, than the out-of-pocket cost of the railroads. The uncontroverted shipper testimony was to the effect that price was vir-

[4] The long-term out-of-pocket costs were computed under an ICC-sponsored formula which generally holds that 80% of rail operating expenses, rents and taxes are out-of-pocket in that they will vary with traffic. To this is added a return element of 4% on a portion of the investment (all the equipment and 50% of the road property), which is apportioned to all traffic on a proportional basis. Compare n. 3, *supra*.

[5] This figure is not precisely a cost figure. Rather it is the barge fully distributed cost, plus the charge made for the truck portion of the service and the charge for barge-truck transfer. Since all parties seem willing to treat the figure as one of fully distributed cost for the barge-truck combination, no further mention will be made of its disparate elements.

[6] Because the barge-truck rate of $5.11 was below the fully distributed cost of the service, Division 2 of the ICC initially concluded that the barge-truck combination had forfeited its right to claim that its inherent advantage of lower fully distributed cost was being impaired by the railroads' setting of a matching rate. On reconsideration, the full Commission reversed this ruling by Division 2, observing that there was no evidence that the failure of the barge-truck rate to equal fully distributed cost was due to anything but the barge lines' ignorance of the precise amount of their fully distributed cost for this service. This determination is not challenged here by any party and we express no opinion on it.

[7] Out-of-pocket costs have been regarded generally in these cases as equivalent to what economists refer to as "incremental" or "marginal" costs. Accordingly we shall equate the terms likewise, although we have no intention of vouching for the accuracy of that equation as a matter of pure economics. Cf. n. 4, *supra*. Such costs are defined generally as the costs specifically incurred by the addition of each new unit of output and do not include any allocation to that unit of pre-existing overhead expenses.

tually the sole determinant of which service would be utilized, but that, were the rates charged by the railroads and the barge-truck combination the same, all the traffic would go to the railroads.

The railroads contended that they should be permitted to maintain the $5.11 rate, once it was shown to exceed the out-of-pocket cost attributable to the service, on the ground that any rate so set would enable them to make a profit on the traffic. The railroads further contended that the fact that the rate was substantially below their fully distributed cost for the service was irrelevant, since that cost in no way reflected the profitability of the traffic to them. The barge-truck interests, on the other hand, took the position that § 15a (3) required the Commission to look to the railroads' fully distributed costs in order to ascertain which of the competing modes had the inherent cost advantage on the traffic at issue. They argued that the fact that the railroads' rate would be profitable was merely the minimum requirement under the statute. The railroads in response contended that inherent advantage should be determined by a comparison of out-of-pocket rather than fully distributed costs, and they produced several economists to testify that, from the standpoint of economic theory, the comparison of out-of-pocket, or incremental, costs was the only rational way of regulating competitive rates.

The ICC rejected the railroads' contention that out-of-pocket costs should be the basis on which inherent advantage should be determined. The Commission observed that it had in the past regularly viewed fully distributed costs as the appropriate basis for determining which of two competing modes was the lower cost mode as regards particular traffic. It further indicated that the legislative history of § 15a (3) revealed that Congress had in mind a comparison of fully distributed costs when it inserted the reference to the National Transportation

Policy into that section in place of language sought by the railroads. The Commission also emphasized that there was a rulemaking proceeding pending before it in which the whole question of the proper standard of costing in situations involving intermodal competition was being examined in depth, and stated that "a radical departure from the fully distributed cost norm" would not be justified on the basis of the record before it in this case.

Having decided to utilize a comparison between fully distributed costs to determine inherent advantage, the Commission then concluded that the rate set by the railroads would undercut the barge-truck combination's ability to exploit its inherent advantage because the rate would force the competing carriers to go well below their own fully distributed costs to recapture the traffic from the railroads. Moreover, since the result sought by the railroads was general permission to set rates on an out-of-pocket basis, the Commission concluded that eventually the railroads could take all the traffic away from the barge-truck combination because the out-of-pocket costs of the former were lower than those of the latter and, therefore, in any rate war the railroads would be able to outlast their competitors. Accordingly, the Commission ordered that the railroads' rate be canceled.

The District Court read the statute and its accompanying legislative history to reflect a congressional judgment that inherent advantage should be determined in most cases by a comparison of out-of-pocket costs and that, therefore, railroads should generally be permitted to set any individual rate they choose as long as that rate is compensatory.[8] The court also held that the

[8] A rate is compensatory in the sense used by the District Court any time it is greater than the out-of-pocket cost of the service for which the rate is set. The term fully compensatory is sometimes used to describe a rate in excess of fully distributed costs.

Commission had failed adequately to articulate its reasons for deciding that the proper way of determining which mode of transportation was the more efficient was by comparison of fully distributed costs rather than out-of-pocket costs. Although this later holding appears first in its opinion, it is evident that it must logically follow its ruling on the meaning of § 15a (3), since if Congress in enacting that section had already decided that inherent advantage should be determined by reference to fully distributed costs, there would be no special burden on the Commission to justify its use of them.

II.

This Court has previously had occasion to consider the meaning and legislative history of § 15a (3) of the Interstate Commerce Act in *ICC* v. *New York, N. H. & H. R. Co.*, 372 U. S. 744 (1963) (*"New Haven"*), and both the ICC and the District Court have relied heavily on that decision as support for the conflicting results reached by them in these cases. Because the statute and its relevant legislative history were so thoroughly canvassed there, we shall not undertake any extended discussion of the same material here. Instead, we shall refer to that opinion for most of the relevant history.

So far as relevant here, § 15a (3) provides that:

> "[r]ates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

The National Transportation Policy, 49 U. S. C. preceding § 1, states that it is the intention of the Congress:

> "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each . . . ."

The enactment of § 15a (3) in 1958 was due primarily to complaints by the railroads that the ICC had maintained rates at artificially high levels in order to protect competing modes from being driven out of business by railroad competition.[9] The bill that eventuated in the language that is presently § 15a (3) originally provided that the ICC, in considering rate reductions, should, in a proceeding involving competition with another mode of transportation, "consider the facts and circumstances attending the movement of the traffic by railroad and *not by such other mode.*" (Emphasis added.) 372 U. S., at 754. This language was objected to strongly by both the ICC and representatives of those carriers with which the railroads were in competition. See Hearings on S. 3778 before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958). The basic ground of objection was that by looking only to the effect of a rate reduction on the carrier proposing it, the ICC would be unable to protect the "inherent advantages" enjoyed by competing carriers on the traffic to which a rate reduction was to be applied.

[9] An illustration of such a case is the decision of the ICC that was reversed in the *New Haven* case. There the ICC had refused to permit the railroads to set a rate which was not only above their out-of-pocket cost for the service but was also above their fully distributed cost for approximately half of the movements involved. The Commission did not rely on a determination of which of the competing carriers had the inherent advantage as to costs, but instead decided broadly that the rate would eventually destroy the coastwise shipping industry and therefore should be prohibited. This Court held that, in general, the ICC was required to determine which of the competing carriers possessed the inherent advantage before a rate could be ordered cancelled in order to protect a carrier's present rate. While the Court indicated that the Nation's defense needs might permit protection of even a higher cost carrier in some cases, it held that the ICC had not adequately shown *New Haven* to be such a case.

Unfortunately, the meaning of the term "inherent advantage," which is what the Commission is supposed to protect, is nowhere spelled out in the statute. The railroads argue, and the District Court held, that Congress intended by the term to refer to situations in which one carrier could transport goods at a lower incremental cost than another. The fallacy of this argument is that it renders the term "inherent advantage" essentially meaningless in the context of the language and history of § 15a (3).

Since the pricing of railroad services below out-of-pocket or incremental cost would result in a net revenue loss to the railroad on the carriage, the ICC could prohibit such practices without reference to the costs of any other competing carrier. And this is precisely what the language of the bill as originally endorsed by the railroads would have provided by its use of the phrase "and not by such other mode." See *supra*, at 580. This language was, however, rejected by the Congress and the alternative formulation proposed by the ICC, see Hearings, *supra*, at 169, was substituted for it.

As this Court said in the *New Haven* case:

> "The principal reason for this reference [to the National Transportation Policy] . . . was to emphasize the power of the Commission to prevent the railroads from destroying or impairing the inherent advantages of other modes. And the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed cost, forced a smaller competing *lower cost* mode to go below its own fully distributed cost and thus perhaps to go out of business." 372 U. S., at 758.

Since these cases are identical to the example just described, it would seem that, at the very least, the result reached by the Commission here is presumptively in accord with the language of the statute and with the intent of Congress in utilizing that language.[10]

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[10] The appellees also contend, and the District Court held, that the statements in the legislative history of § 15a (3) that Congress intended to compel the Commission to return to the approach to competitive rate regulation it had utilized in the case of *New Automobiles in Interstate Commerce*, 259 I. C. C. 475 (1945), indicate that out-of-pocket ratemaking was intended to be the rule in such cases. However, the passage quoted from *New Automobiles* simply states that the rates of one mode of transportation should not be held up merely to protect competing modes. It says nothing at all about inherent advantages.

The railroads argue that the basic thrust of the *New Automobiles* case was to compare costs on an out-of-pocket basis. And it is true that many of the comparisons there made were on that basis. However, an examination of what the Commission actually said and did in *New Automobiles* compels the conclusion that no flat rule of comparison of out-of-pocket costs was there laid down. For example, the Commission concluded that on the basis of a comparison with the railroads' out-of-pocket costs for shipping automobiles, the truckers were the lower cost mode only up to 120 miles. On a fully distributed cost comparison the truckers were the lower cost mode up to 230 miles. 259 I. C. C., at 528. After discussing at some length the concept of reasonable minimum rates, the Commission ultimately concluded that generally the truckers had the cost advantage at distances up to 200 miles and that the railroads should be permitted to set rates that would permit them to compete for the longer-haul traffic. 259 I. C. C., at 539.

Given the fact that the Commission was dealing with an attempt by the truckers to get it to hold up railroad rates for distances even greater than 600 miles, it is not surprising that the issue of measuring inherent advantage as between fully distributed and out-of-pocket costs did not receive detailed consideration, since by either method the truckers were the low cost mode only up to a little more than 200 miles. Thus it cannot fairly be said that *New Automobiles* represents a considered choice between the two meth-

The District Court, however, ignored the above portion of the *New Haven* opinion and seized on certain other language therein to the effect that:

> "It may be, for example, that neither a comparison of 'out-of-pocket' nor a comparison of 'fully distributed' costs, as those terms are defined by the Commission, is the appropriate method of deciding which of two competing modes has the cost advantage on a given movement." 372 U. S., at 760.

It coupled this language with its interpretation of § 15a (3) as having the purpose to promote "hard competition," and concluded that the Commission had the burden of justifying any departure from using out-of-pocket cost as the means of determining inherent cost advantage.

We think that the District Court erred in its reading both of the prior *New Haven* decision and of the extent to which Congress intended to foster intermodal competition. We note first that nothing in the language of the *New Haven* opinion indicates a preference for either out-of-pocket or fully distributed costs as a measure of inherent advantage; rather, all that is said is that the appropriate measure "may be" neither. Given the fact that the insertion of the reference to inherent advantage into

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ods of cost comparison. Rather what it stands for is the principle emphasized in the *New Haven* case that the rates of one mode should not be held up to protect the revenues of a competitor without regard to which is the low cost carrier.

In any event, what matters so far as § 15a (3) is concerned is not what the Commission meant in *New Automobiles* but what Congress thought it meant in 1958 when the section was enacted. As we have shown in the text of the opinion above, Congress considered *New Automobiles* to stand for the principle that the rate structure of a competing mode should not be protected by the Commission simply to prevent it from losing business through competition.

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§ 15a (3) came about at the insistence of carriers that were demanding that fully distributed costs be the sole measure of that advantage,[11] we think that the clear import of the foregoing statement in the *New Haven* opinion was that the Commission *could*, after due consideration, decide that some other measure of comparative costs might be more satisfactory in situations involving intermodal competition than the one it had traditionally utilized.[12] That is a far cry from saying that it *must*.

The District Court apparently believed that the Commission was required to exercise its judgment in the direction of using out-of-pocket costs as the rate floor

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[11] The District Court also relied on the rejection of a similar proposal by truck and barge interests that fully distributed costs be the floor for reasonable minimum rates in the course of the enactment of the National Transportation Policy in 1940. It seems clear, however, that one of the major reasons for the rejection of the so-called Miller-Wadsworth amendment by Congress was the possibility that its enactment would prevent low-value industrial and agricultural commodities from being carried at a rate low enough to make it economically feasible to ship them in interstate commerce. See generally Nelson, Rate-Making In Transportation—Congressional Intent, 1960 Duke L. J. 221, 228–238.

[12] While it is true that, for varying and sometimes unexplained reasons, the Commission has not invariably used fully distributed costs as the basis for cost comparisons in situations involving intermodal competition, see 268 F. Supp., at 78, it is also true that it has generally declared fully distributed cost comparisons to be preferable. Thus in the hearings on the bill that was to become § 15a (3), Commissioner Freas stated:

"Whenever conditions permit, given transportation should return the full cost of performing carrier service. . . . In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket cost of another. If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier." Quoted at 372 U. S., at 755.

because that would encourage "hard" [13] competition. We do not deny that the competition that would result from such a decision would probably be "hard." Indeed, from the admittedly scanty evidence in this record, one might well conclude that the competition resulting from out-of-pocket ratemaking by the railroads would be so hard as to run a considerable number of presently existing barge and truck lines out of business.

We disagree, however, with the District Court's reading of congressional intent. The language contained in § 15a (3) was the product of a bitter struggle between the railroads and their competitors. One of the specific fears of those competitors that prompted the change from the original language used in the bill was that the bill as it then read would permit essentially unregulated competition between all the various transportation modes. It was argued with considerable force that permitting the railroads to price on an out-of-pocket basis to meet competition would result in the

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[13] The District Court ascertained the legislative purpose to promote "hard competition" from the following passage from the *New Haven* opinion:

"Section 15a (3), in other words, made it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. The principal purpose of the reference to the National Transportation Policy, as we have seen, was to prevent a carrier from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, by setting a rate, below its own fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic." 372 U. S., at 759.

Since the sentence following the term "hard competition" described an example of the competition prohibited by the National Transportation Policy that is identical to the facts of the present case, the District Court's use of the term to reverse the ICC's decision here seems somewhat peculiar.

eventual complete triumph of the railroads in intermodal competition because of their ability to impose all their constant costs [14] on traffic for which there was no competition.

The economists who testified for the railroads in this case all stated that such an unequal allocation of constant costs among shippers on the basis of demand for railroad service, *i. e.*, on the existence of competition for particular traffic,[15] was economically sound and desirable. Apart from the merits of this contention as a matter of economic theory,[16] it is quite clear that it was

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[14] Constant costs are, broadly speaking, those items of expense which are incurred by a business regardless of the scale of its operations. They are essentially the equivalent to what is commonly called overhead expenses. For railroads constant costs include such items as real estate taxes, certain rents, much right-of-way maintenance expense and similar expenses.

[15] Unequal allocation of constant costs as an element of the rate charged also occurs commonly where a bulky commodity is so low valued on a per ton basis that setting a rate by reference to the fully distributed cost of carrying the commodity would make it uneconomic to ship it. See n. 11, *supra*.

[16] This Court is not particularly suited to pass on the merits of the economic arguments made by the railroads' expert witnesses in these cases. Moreover, their soundness is not especially relevant to the result we reach in the present posture of this controversy. However, because the economic testimony is emphasized so heavily by both the railroads and the United States in their arguments to us, we shall venture a few observations on it.

Most of the economic testimony is directed towards proving that the utilization of out-of-pocket costs in setting rates permits the railroads to maximize their profits. To the extent that out-of-pocket costs are accurately computed, that proposition appears uncontrovertible. The economists then go on to argue, in effect, that what is good for the railroads is good for the country. This argument is developed as follows. Whenever a railroad lowers its rate, the shipper to whom that rate is available benefits. As long as the rate is above the out-of-pocket cost of the service, the railroad benefits by obtaining the profits from traffic it formerly did not carry. The fact that a competing carrier may lose the revenue it

a contention that was not by any means wholly accepted by the Congress that enacted § 15a (3). One of the specific examples given of an undesirable practice, and accepted by the members of the Commerce Committee

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previously earned by carrying the traffic is immaterial because the railroad's ability to make a profit by charging the lower rate shows that it is, in some sense, more efficient than its competitor.

In order to evaluate the foregoing argument certain other aspects of a railroad's operation must be kept in mind. The reason why a railroad's fully distributed costs are substantially greater than its out-of-pocket costs on any given traffic is, *inter alia*, because certain constant costs, see n. 14, *supra*, are allocated to that traffic on a proportional basis despite the fact that those costs will be incurred by the railroad whether it carries the particular traffic or not. These constant costs must be earned if the railroad is to stay in business. They are allocated proportionally on the theory that, all other factors being equal, such an allocation will be the best way of assuring that each shipper contributes his fair share towards covering the constant costs. Obviously to the extent that any shipper pays more of the constant costs than another without any good reason for so doing that shipper is, in some sense, discriminated against.

The railroad economists point out that, because constant costs by definition are not attributable to the carriage of any particular traffic, it is to some extent arbitrary to allocate them to particular traffic. They further contend that all shippers presently utilizing a railroad's services are benefited when the railroad obtains additional traffic at a profit to it, because that profit can be used to pay a portion of the constant costs currently being charged wholly to them. The fact that charging a rate less than its fully distributed cost of carrying the traffic results in the shipper of that freight paying a disproportionally low share of the railroad's constant costs is considered to be outweighed by the overall benefit to the other shippers of having the absolute amount borne by them of the constant costs decreased by the profit earned on the traffic.

It seems apparent, however, that in a case where the sole reason that a rate below fully distributed cost is necessary to attract such additional traffic is the competition of another mode of transportation, the continued existence of that competition is also the sole economic justification for maintaining the rate at a relative level that favors one shipper over others. If the competing carrier is

that drafted the statute as such, was a case in which certain railroads had engaged in day-to-day differential pricing on the carriage of citrus fruit from Florida depending on whether competitive carriage was available

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driven out of business because of its inability to match the railroad's lower rates set on an out-of-pocket basis, the economic justification for permitting the continuation of those low rates would seem to disappear. Yet the railroad economists assert that in such a situation the railroad should be required by the ICC to maintain the rate at its original level. The obvious reason for this position is that permitting a railroad to raise its rates once it had effectively destroyed a competitor in one area would enable it to price on an out-of-pocket basis in competition with another carrier in a different area thereafter and, in turn, drive that carrier out of business. Eventually a railroad could eliminate all its competitors whose out-of-pocket costs were higher than its own. After this was accomplished the railroad could re-price all its services on a fully distributed cost basis thereby eliminating all discrimination between its shipper customers.

Of course, the shippers formerly served by competing modes at rates profitable to them but lower than the railroad's fully distributed costs would at that point have lost the advantage of the low cost service. The only way to perpetuate the advantage previously enjoyed by those shippers would be, as the railroad economists recognized, artificially to maintain their rates at the former level despite the absence of present economic justification for such a low rate. (It is true that were the barriers to re-entry into the transportation market low, as asserted by the railroad economists, the potential competition created by the possibility of such re-entry by a competing mode could furnish an economic justification for the continuance of the original low rate. However, there is no factual evidence in this record from which it can be concluded that barriers to re-entry are low enough to create such potential competition.)

If the only justification for the maintenance of a disproportionally low rate to some shippers is the fact that competition existed once upon a time for their business, would it be irrational to conclude that it would be preferable to keep the original competition in business to serve those shippers and to require the railroad to look elsewhere for additional revenue? Would it, for example, be possible for railroads to increase their revenues instead by increasing, through selective rate decreases, the volume of traffic shipped by

by ship that day. See Hearings, *supra*, at 153–155. Similar complaints were made about seasonal variations in rates by railroads depending on whether winter conditions interfered with the carriage of freight by water. *Id.*, at 162–163. Yet, from an economic standpoint, such rate variations make perfect competitive sense insofar as maximization of railroad revenues is concerned.[17]

The simple fact is that § 15a (3) was not enacted, as the railroads claim, to enable them to price their services in such a way as to obtain the maximum revenue therefrom. The very words of the statute speak of "preserv[ing]" the inherent advantages of each mode of transportation. If all that was meant by the statute was to prevent wholly noncompensatory pricing by regulated carriers, language that was a good deal clearer could easily have been used. And, as we have shown above,

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persons who presently pay amounts in excess of the fully distributed cost for the service afforded them? These are only a few of the questions that come to mind when we attempt to evaluate the economic arguments made in this case. We do not pretend to be able to answer them. We merely note their existence as evidence that we do not find the arguments made to the ICC here as compelling as did the District Court.

Our discussion here should not be interpreted as a rejection of the basic economic points made by the railroads. It is merely intended to illustrate the desirability of having the initial resolution of these issues made by a tribunal, and in a proceeding, more suitable than the present one.

[17] It is, of course, true that such discriminations need have no necessary relationship to a railroad's cost of service, whether that is computed on a fully distributed or out-of-pocket basis. On the other hand, it is also evident that what is basically at issue is a carrier's right to price discriminatorily, either between shipments or shippers, in order to maximize revenues by competition. By contrast it can be noted that the railroads have apparently retained their prior rate of $11.86 per ton on ingot molds in areas where they have no competition from barge-truck service. The discrimination thus created is not too dissimilar from that embodied in the above examples.

at least one version of such clear language was proposed by the railroads and rejected by the Congress. If the theories advanced by the economists who testified in this case are as compelling as they seem to feel they are, Congress is the body to whom they should be addressed. The courts are ill-qualified indeed to make the kind of basic judgments about economic policy sought by the railroads here. And it would be particularly inappropriate for a court to award a carrier, on economic grounds, relief denied it by the legislature. Yet this is precisely what the District Court has done in this case.

We do not mean to suggest by the foregoing discussion that the Commission is similarly barred from making legislative judgments about matters of economic policy. It is precisely to permit such judgments that the task of regulating transportation rates has been entrusted to a specialized administrative agency rather than to courts of general jurisdiction. Of course, the Commission must operate within the limits set out by Congress in enacting the legislation it administers. But nothing we say here should be taken as expressing any view as to the extent that § 15a (3) constitutes a categorical command to the ICC to use fully distributed costs as the only measure of inherent advantage in intermodal rate controversies. As was stated in the *New Haven* case, it "may be" that after due consideration another method of costing will prove to be preferable in such situations as the present one. All we hold here is that the initial determination of that question is for the Commission.

It is in this connection that the timing of this case takes on particular significance. We have already observed that the ICC has presently pending before it a broad-scale examination of the whole question of the cost standards to be used where comparisons of intermodal cost advantages are required. Rather than await the result of that rulemaking proceeding, the railroad

appellees here determined to attempt to raise precisely the same issues in a much more circumscribed proceeding by unilaterally reducing their rates on one item of traffic. The District Court totally ignored the temporary nature of the ICC's action in this case and the pendency of the rulemaking proceeding. Instead, it went ahead and, in the guise of resolving this particular controversy over a single rate reduction, rendered a decision which, for all practical purposes, made the rulemaking proceeding moot. While there might be some justification for such a course when the applicable statute clearly requires the agency to arrive at a given result, this case is emphatically not such a situation. As this Court stated in *New Haven*, "[t]hese and other similar questions should be left for initial resolution to the Commission's informed judgment." 372 U. S., at 761.

The Commission stated here that it intended to exercise its informed judgment by considering the issues presented here in the context of a rulemaking proceeding where it could evaluate the alternatives on the basis of a consideration of the effects of a departure from a fully distributed cost standard on the transportation industry as a whole. Until that evaluation was completed, the Commission took the position that it would continue to follow the practice it had observed in the past of dealing with individual rate reductions on a fully distributed cost basis. The District Court, in effect, refused to permit the Commission to deal with the complex problems of developing a general standard of costing to use in determining inherent advantage in situations involving intermodal competition in the broad context of a rulemaking proceeding. Instead, it ordered the Commission to resolve those problems in the narrow context of this individual rate reduction proceeding.

We have already observed that the District Court erred in interpreting the *New Haven* decision to require

the Commission to permit out-of-pocket pricing in most instances. Given the fact that *New Haven* indicated that the Commission was to exercise its informed judgment in ultimately determining what method of costing was preferable, it is clear that the District Court also erred in refusing to permit the Commission to exercise that judgment in a proceeding it reasonably believed would provide the most adequate record for the resolution of the problems involved. We can see no justification for denying the Commission reasonable latitude to decide where it will resolve these complex issues, in addition to how it will resolve them. The action by the District Court here not only deprives the Commission of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context.

This Court has just recently held that the Federal Power Commission had the authority to fix rates on an area-wide basis rather than on an individual producer basis and that, in order to make such a procedure feasible, it had statutory authority to impose a moratorium upon rate increases by producers for a period of 2½ years after the setting of the area rate. *Permian Basin Area Rate Cases*, 390 U. S. 747 (1968). The basis for this holding was the principle that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." *Id.*, at 776. That principle is equally applicable to rate regulation carried out by the ICC, especially where, as here, the determination made on an interim basis is in general accord with both the legislative history of the statute involved and the results in prior cases decided by the agency. Accordingly, we hold that the Commission had ample authority to decline to deal with the broad contentions advanced by the railroads in

this individual rate case and that the District Court erred in failing to recognize that authority.

The District Court also objected to the failure of the Commission to explain why it permitted out-of-pocket ratemaking where the competing carrier was unregulated and not where the competitor was regulated. The short answer to this is that § 15a (3) by its own terms applies only to "modes of transportation subject to this Act," which by definition means regulated carriers. As a result any arbitrariness that may flow from the distinction recognized by the Commission between regulated and unregulated carriers in situations of intermodal competition is the creation of Congress, not of the Commission.

The District Court also appears to have held that the Commission did not adequately explain how the rate set by the railroads would impair or destroy the barge-truck inherent advantage. Yet the Commission pointed out that the principle proposed by the railroads would, if recognized, permit the railroads to capture all the traffic here that is presently carried by the barge-truck combination because the railroads' out-of-pocket costs were lower than those of the combined barge-truck service. The District Court seems to have been impressed by the fact that the railroads were merely meeting the barge-truck rate, despite the uncontroverted evidence that given equal rates all traffic would move by train. Given a service advantage, it seems somewhat unrealistic to suggest that rate parity does not result in undercutting the competitor that does not possess the service advantage. In any event, regardless of the label used, it seems self-evident that a carrier's "inherent advantage" of being the low cost mode on a fully distributed cost basis is impaired when a competitor sets a rate that forces the carrier to lower its own rate below its fully distributed costs in order to retain the traffic. In addition, when a

rate war would be likely to eventually result in pushing rates to a level at which the rates set would no longer provide a fair profit, the Commission has traditionally, and properly, taken the position that such a rate struggle should be prevented from commencing in the first place. Certainly there is no suggestion here that the rate charged by the barge-truck combination was excessive and in need of being driven down by competitive pressure. We conclude, therefore, that the Commission adequately articulated its reasons for determining that the railroads' rate would impair the inherent advantage enjoyed by the barge-truck service.

The judgment of the District Court is reversed and the cases are remanded to that court with directions to enter a judgment affirming the Commission's order.

It is so ordered.

MR. JUSTICE HARLAN, concurring in the result.

As I understand the Court's position, it is that the Commission has not decided, and thus the Court need not decide, the question expressly left open in *ICC* v. *New York, N. H. & H. R. Co.*, 372 U. S. 744: whether out-of-pocket costs, fully distributed costs, or some third standard should be the criterion for determining, under § 15a (3) of the Interstate Commerce Act, 49 U. S. C. § 15a (3), and the National Transportation Policy, preceding § 1 of the Act, which mode of transportation has the inherent advantage. The reasoning of the Court's opinion is, I take it, that the Commission may properly adhere to a fully distributed costs standard pending its decision in a separate rulemaking proceeding, entitled Rules Governing the Assembling and Presenting of Cost Evidence, Docket No. 34013.

Although I do not doubt that an administrative agency may, where the orderly processes of adjudication or rule-

making require, defer the resolution of issues to more appropriate proceedings,[1] I should have had the greatest difficulty in saying that in fact this had occurred, or had been intended to occur, in these cases.[2] Nonetheless,

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[1] I do not, however, believe that the Court's position is really supported by its references to the area pricing and moratoria systems approved by the Court in the *Permian Basin Area Rate Cases*, 390 U. S. 747. The Court's opinion in those cases emphasized that those administrative devices were warranted in light of the terms of the Natural Gas Act and of the extraordinary difficulties of regulating independent producers of that commodity. I should not have thought it useful or desirable to extrapolate from those unusual circumstances any general extension of the discretion of administrative agencies. Of course, the specific proposition taken by the Court today from the opinion in those cases, which had in turn been taken from *Los Angeles Gas Co.* v. *Railroad Commission*, 289 U. S. 287, 304, may be regarded as a general principle sustained by a number of the Court's opinions. The difficulty, I should have supposed, is that even that general proposition is only dimly relevant to the questions now before us.

[2] The appearance and disappearance of the suggestion that these questions must be deferred pending the Commission's rulemaking proceedings on the presentation of cost evidence deserves a more complete chronicle than the Court has given. In 1965, more than three years after the Commission initiated its rulemaking proceeding, 27 Fed. Reg. 4102, and some two months before it decided these cases, the Commission held that "a comparison of out-of-pocket costs is the most appropriate method for ascertaining . . . inherent competitive advantage" where one of the competing modes is unregulated. The Commission found it unnecessary to defer that question, or even to mention its separate rulemaking proceeding. *Grain in Multiple-Car Shipments—River Crossings to the So.*, 325 I. C. C. 752, 772.

In the present case, the report and order of the Commission's Division 2 indicated that it "adhere[d] to the utilization of fully distributed costs as the standard for determining the inherent advantage of low cost in the situation presented." 323 I. C. C. 758, 762–763. The opinion did not pause to refer to the rulemaking proceeding. In the report and order of the full Commission on reconsideration, the only reference to the rulemaking proceeding was the brief passage quoted by the Court from the opinion's final section. 326

given both the Court's conclusion and the isolated statements in the Commission's opinion consistent with that conclusion, I believe it best to acquiesce in the result reached by the Court, rather than to express my views

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I. C. C. 77, 84. The three dissenting members of the Commission found it unnecessary to refer to the rulemaking proceeding. *Id.*, at 85, 86, 90.

One year after its decision in these cases, the Commission had occasion to review its approach to these problems. Although the Commission adhered to its decisions in these cases and in *Grain in Multiple-Car Shipments—River Crossings to the So., supra,* it did not find it necessary to advert to its separate rulemaking proceedings. It concluded that where the competition from a regulated carrier is "relatively limited" it would apply the rule from *Grain in Multiple-Car Shipments,* and not that from these cases. There is no evidence whatever that the Commission regarded these two lines of authority merely as temporary expedients, useful only until more careful analysis is possible. *Wine, Pacific Coast to the East,* 329 I. C. C. 167, 171–175. And see the concurring opinions of Vice Chairman Tucker and Commissioner Freas, *id.*, at 176, as well as the separate opinion of Commissioner Murphy, dissenting in part, *id.*, at 177.

Although the three-judge District Court set aside the Commission's order in these cases, it did not mention the rulemaking proceeding. 268 F. Supp. 71.

In its jurisdictional statement to this Court, the Commission adverted to the rulemaking proceeding only in a single sentence, with an identifying footnote, contained in the statement's conclusion. Jurisdictional Statement in No. 809, at 17. In the memorandum of the United States, urging that probable jurisdiction be noted, it was said that these cases "present a major issue reserved by this Court" in *New Haven,* which was "whether out-of-pocket costs, fully distributed costs, or 'some different measure' should be the criterion for determining which mode of transportation has the inherent advantage . . . ." Memorandum for the United States 3–4. In the various briefs presented to the Court in these four cases, including the briefs of the United States and of the Commission, I have looked in vain for any suggestion that, as the Court now holds, the Commission's opinion was intended merely to defer resolution of the question reserved in *New Haven.* Indeed, I have

as a single Justice upon the issue which the Court shuns.[3]

I would be less than candid if I did not say that I regard this disposition of these cases as unsatisfactory, for what is now done leaves this important question just where our decision of five years ago in the *New Haven* case left it, and new litigation will now be necessary to resolve the issue.

MR. JUSTICE DOUGLAS, dissenting.

I would affirm the judgment below for the reasons stated by the District Court in 268 F. Supp. 71.

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searched unsuccessfully in the Commission's brief for any reference, however fleeting, to the rulemaking proceeding. One might have supposed that if, as the Court now finds, the existence of the rulemaking proceeding was, *in the Commission's view*, decisive to the result of this case, the Commission would have found room in its brief of 51 pages at least to cite those proceedings. It is difficult to escape the inference that the Court has, on a basis that will doubtless prove as surprising to the parties as it did to me, simply postponed decision of a difficult issue.

[3] It is, however, proper to add that I have found no support in the record for the Court's suggestion that "the railroad appellees here determined to attempt to raise precisely the same issues [as in the rulemaking proceeding] in a much more circumscribed proceeding by unilaterally reducing their rates on one item of traffic." *Ante*, at 590–591.

WAINWRIGHT *v.* CITY OF NEW ORLEANS.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 13. Argued October 9–10, 1967.—Decided June 17, 1968.

248 La. 1097, 184 So. 2d 23, certiorari dismissed.

Melvin L. Wulf argued the cause for petitioner. With him on the brief were *Norman Dorsen* and *Marvin M. Karpatkin.*

Richard C. Seither argued the cause for respondent. With him on the brief was *Alvin J. Liska.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE HARLAN, concurring.

I wish to state in a few words my reasons for joining in the dismissal of this writ as improvidently granted. For reasons stated in the dissenting opinion of my Brother DOUGLAS I agree that the dispositive federal issue in this case is whether the petitioner used an unreasonable amount of force in resisting what on this record must be regarded as an illegal attempt by the police to search his person. I find this record too opaque to permit any satisfactory adjudication of that question. See *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568–575.

MR. JUSTICE FORTAS, with whom MR. JUSTICE MARSHALL joins, concurring.

With profound deference to the opinions of my Brethren who have filed opinions in this case, I am impelled to add this note. Upon oral argument and further study after the writ was granted, it became apparent that the facts necessary for evaluation of the dispositive

constitutional issues in this case are not adequately presented by the record before us. It is also entirely clear that they cannot now be developed on remand with any verisimilitude.

The central issue that this case appeared to present for decision when certiorari was granted is of great importance. It is whether the police, seeing a pedestrian who fits the description of a person suspected of murder, may accost the pedestrian and stop him; and when and to what extent is the accosted person justified in refusing to cooperate with efforts of the police to establish that he is or is not the person whom they seek.

I am not prepared to say that, regardless of the presence or absence of adequate cause for police action, the arrest or the attempt by the officers to search is unlawful, as my Brother HARLAN'S opinion suggests, where the accosted person produces no identification, attempts three times to walk away, and refuses to dispel any doubt by showing that his forearm is not tattooed. I should want to know whether, in fact, there was constitutionally adequate cause for the police to suspect that the pedestrian was the man sought for murder.

If the Court should, on an adequate record, determine that the police action in stopping and arresting petitioner violated his constitutional rights, there would remain, among other issues the question of culpability for the scuffle that ensued. My Brethren who have written in this case seem agreed that the record is too sketchy to permit decision of this issue.

The Court has properly dismissed the writ as improvidently granted. I respectfully submit that the Court is correct to leave the matter there. I should regret any inference that might be derived from the opinions of my Brethren that this Court would or should hold that the police may not arrest and seek by reasonable means to identify a pedestrian whom, for adequate cause, they

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believe to be a suspect in a murder case. I do not believe that this Court would or should, without careful analysis, endorse the right of a pedestrian, accosted by the police because he fits the description of a person wanted for murder, to resist the officers so vigorously that they are "bounced from wall to wall physically" or to react "like a football player going through a line." Our jurisprudence teaches that we should decide issues on the basis of facts of record. This is especially important in the difficult, dangerous, and subtle field where the essential office of the policeman impinges upon the basic freedom of the citizen.

MR. CHIEF JUSTICE WARREN, dissenting.

About midnight on October 12, 1964, petitioner, a student at Tulane University Law School, left his French Quarter apartment in New Orleans to get something to eat. Approximately four blocks from his apartment, two officers of the New Orleans Police Department who had observed petitioner as they cruised by in their car stopped him because in their opinion he fitted the description of a man suspected of murder. That suspect had tattooed on his left forearm the words "born to raise hell." Petitioner told the officers he had identification at home but not on his person. He gave them his name and address, and informed them he was a law student and was on his way to get something to eat. The officers told petitioner they thought he resembled a murder suspect, and asked him to remove his jacket so they could check his forearm for the tattoo. Petitioner refused, saying he would not allow himself "to be molested by a bunch of cops here on the street," and he "didn't want to be humiliated by the police." Petitioner was then suffering from a skin ailment which he apparently regarded as unsightly and which would have been exposed had he removed his

jacket, though he did not communicate this to the police. The police arrested him on a charge of vagrancy by loitering and frisked him.

During this incident petitioner attempted three times peacefully to walk away from the officers. The first two attempts came after petitioner had given what he regarded as sufficient identification. The third, although the officers were not certain about this, apparently occurred after petitioner was informed he was under arrest. Evidently on the basis of this last attempt, petitioner was subsequently charged with resisting an officer. Petitioner used no force in any of his attempts to walk away and each time stopped when so directed by the police.

After petitioner was inside the police car he called the officers "stupid cops," whereupon they told him he would also be charged with reviling the police. When the car arrived at the police station, petitioner offered to produce identification if they would take him home, but this offer was rejected. In the stationhouse, petitioner was interrogated for about 10 minutes concerning a "possible murder suspect." Thereafter, he was booked for vagrancy by loitering, resisting an officer, and reviling the police.

An officer then told petitioner to remove his jacket. Petitioner refused, folding his arms and crouching in a corner. Two officers, according to one of them, then "got hold of each of his arms . . . [and] tried to pry his arms apart, and . . . were bounced from wall to wall and bench to bench and back again." Petitioner did not strike at or kick the officers, but rather, according to one officer, "danc[ed] from wall to wall . . . trying to keep us from getting his arms." According to another, the officers were jostled only by "the combined effort of Mr. Wainwright in his refusal to remove the jacket. Force was necessary to remove the jacket by the officers." The

officers sustained no bruises, marks, or torn clothing as a result of this incident, and succeeded in removing petitioner's jacket and discovering he had no tattoo.

Petitioner's trial for the three charges based on the episode in the street—vagrancy by loitering, resisting an officer and reviling the police—commenced on December 4, 1964. After partial testimony the trial was adjourned, and not resumed until May 7, 1965, when the court heard further partial testimony and adjourned over petitioner's objection. The trial was again resumed on May 14, and at the close of the State's case on that day petitioner's motion for dismissal was taken under advisement, and three new charges based on events inside the police station were lodged against him. Respondent, before this Court, characterizes the original charges which were prosecuted against petitioner intermittently over a six-month period as "long-abandoned." Why the police waited six months before bringing charges based on events occurring within the police station is nowhere explained.

These new charges consisted of two counts of disturbing the peace by assaulting police officers, and one count of resisting an officer. Petitioner was convicted in the Municipal Court on all three counts. On appeal to the Criminal District Court, petitioner argued that his arrest and subsequent search were unlawful, and therefore he had a right to resist the search. He claimed that "[t]he legality of the arrest must be shown in order to find the defendant guilty of any crime in resisting it." He also argued that the evidence showed only that he tried to hold his jacket on, and that resistance of this type does not constitute the crime of assault. The court reversed the conviction for resisting an officer on the ground that the resistance must occur while the officer is making an arrest to constitute a crime under the ordinance. However, the court found the arrest was lawful, and since

"[t]he defendant was in police custody pursuant to a legal arrest . . . the officers had the right and the obligation to search the defendant . . . ." It held that "an individual in lawful police custody" cannot resist the actions of the police in doing their duty, and therefore affirmed the convictions for assault.[1]

Petitioner sought writs of certiorari, prohibition, and mandamus in the Louisiana Supreme Court, again arguing that because the arrest and search were unlawful he had a right to resist, and also that the "evidence merely shows that the defendant acted in self-defense and resisted the removal of his clothing." The court denied his application, holding: "The ruling of the Criminal District Court for the Parish of Orleans is correct."

Petitioner argues before this Court that his arrest and subsequent search in the stationhouse were unlawful and that he had a right under the Fourth Amendment reasonably to resist the unlawful search. In my view, there can be no doubt on this record that the arrest and subsequent search of petitioner were illegal. I believe that the illegality of the search alone requires reversal of the judgment below, which rejected possibly meritorious state-law claims on the erroneous premise that the search was lawful. Therefore, in accordance with this Court's well-established practice "not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record," *Garner* v. *Louisiana*, 368 U. S. 157, 163 (1961), I would reverse and remand this case without reaching the question whether petitioner had, and acted within, a Fourth Amendment right to resist.

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[1] The ordinance under which petitioner was convicted provides: "No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another." § 42–24 Code of the City of New Orleans, Louisiana.

The officers had neither a warrant nor probable cause to arrest petitioner for vagrancy by loitering.[2] The loitering charge was based on the inconsequential circumstance that petitioner had been standing still for 5 to 10 seconds before the police approached him. That petitioner had no identification papers on his person and had very little funds obviously add nothing which could constitutionally make his conduct criminal. Cf. *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960).

My Brother FORTAS suggests that we cannot determine whether petitioner's arrest was unlawful because the record does not reveal whether the officers had probable

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[2] The reviling-the-police charge arose from an incident subsequent to the unlawful arrest. While it is not entirely clear from the testimony whether the charge of resisting an officer was based on petitioner's pre- or post-arrest attempt to walk away, the decision of the Criminal District Court reversing petitioner's conviction for resisting an officer based on events inside the police station makes clear that to constitute a crime under the relevant New Orleans ordinance the resistance must occur in the process of an arrest. Therefore, petitioner's pre-arrest attempts to walk away are irrelevant. His post-arrest attempt, just as his post-arrest alleged reviling of the police, cannot justify the initial arrest for vagrancy. Cf. *United States* v. *Di Re*, 332 U. S. 581, 595 (1948); *Byars* v. *United States*, 273 U. S. 28, 29 (1927). In any event, it is evident that these two charges are as baseless as the vagrancy charge. A peaceful attempt to walk away from a police officer, where the accused has identified himself, has committed no crime in the presence of the officer, and stops as soon as the officer directs him to cannot be regarded as the crime of resisting an officer, and, it is fairly clear, would not be so regarded in Louisiana. See *State* v. *Dunnington*, 157 La. 369, 102 So. 478 (1924); *State* v. *Scott*, 123 La. 1085, 49 So. 715 (1909). And with due regard for the sensitivity of police officers, it is simply inconceivable that it can be made criminal to speak the words "stupid cop," without more, in the privacy of a police car. It seems likely that the abandonment of the prosecution on these charges after the State had presented its case indicates that the prosecuting officials were well aware of the groundlessness of all three charges.

cause to arrest him for murder. I agree that the record does not permit a determination of whether the officers could lawfully have arrested petitioner for murder. With due respect, however, I suggest that this is an irrelevant inadequacy in the record. The record does establish that petitioner was not arrested for murder. The record does establish that the police interrogated petitioner for about 10 minutes concerning the murder before it was decided that he would not be booked for murder. The record does establish that petitioner was booked only for vagrancy by loitering, resisting an officer, and reviling the police.

"Booking" is an administrative record of an arrest. When a defendant is booked, an entry is made on the police "arrest book" indicating, generally, the name of the person arrested, the date and time of the arrest or booking, the offense for which he was arrested, and other information.[3] In Louisiana, as in most jurisdictions,[4] the police are required by law to book a suspect in this manner. La. Code Crim. Proc., Art. 228.[5] And as

[3] See W. LaFave, Arrest: The Decision to Take a Suspect into Custody 379–382 (1965). Cf. The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 8 (1967).

[4] See, *e. g.*, New York City Charter and Administrative Code § 435–12.0 (1963); District of Columbia Code § 4–134 (1967).

[5] La. Code Crim. Proc., Art. 228, provides that: "It is the duty of every peace officer making an arrest, or having an arrested person in his custody, promptly to conduct the person arrested to the nearest jail or police station and *cause him to be booked.* A person is booked by an entry, in a book kept for that purpose, showing his name and address, *the offense charged against him,* by whom he was arrested, a list of any property taken from him, and the date and time of booking. Every jail and police station shall keep a book for the listing of the above information as to each prisoner received. The book shall always be open for public inspection. The person booked shall be imprisoned unless he is released on bail." (Emphasis added.)

the Official Comment upon the pertinent Louisiana statute recognizes, this official and permanent arrest record "provides a valuable protection against secret arrests and improper police tactics." 1 La. Code Crim. Proc., p. 131. I see no more justification for permitting the State to disregard its own booking record than for permitting any other administrative body to disregard its own records. Quite the contrary. In the "low-visibility" sphere of police investigatory practices, there are obvious and compelling reasons why official records should prevail over the second-guessing of lawyers and judges. Nor would holding the police to official records frustrate any legitimate interest of society. If the police in this case really believed that petitioner was the murder suspect, and if they had probable cause to so believe, all they had to do was to arrest and book him for murder.[6] If they did not have such probable cause at the time they confronted petitioner on the street, they might have used techniques short of arresting him on a trumped-up charge to verify their suspicions.[7]

It is perfectly plain, however, that the police in this case were, to say the least, not confident that petitioner

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[6] Of course, I do not mean to suggest that a defendant arrested and booked for one crime cannot later be charged with other crimes. The point is simply that when a controversy arises over the legality of the arrest, the police should be held to the booked offense.

[7] For example, one officer might have followed petitioner while the other secured more detailed information about the murder suspect from headquarters, and/or checked petitioner's identification by looking at a phonebook or going to the address he gave them. They might also have checked with someone connected with petitioner's law school. Another alternative would have been to suggest that petitioner voluntarily return to his apartment, which the officers knew was only four blocks away from the scene of the arrest, to secure identification—an offer which petitioner made upon arrival at the police station and the officers rejected.

was the murder suspect, and that the vagrancy charge here was used as a pretext for holding petitioner for further questioning concerning the murder. This technique, using a minor and imaginary charge to hold an individual, in my judgment deserves unqualified condemnation.[8] It is a technique which makes personal liberty and dignity contingent upon the whims of a police officer, and can serve only to engender fear, resentment, and disrespect of the police in the populace which they serve.

Since the arrest was unlawful, the subsequent search of petitioner in the stationhouse was also unlawful. See *Henry* v. *United States*, 361 U. S. 98 (1959); *Trupiano* v. *United States*, 334 U. S. 699 (1948); *Johnson* v. *United States*, 333 U. S. 10 (1948); *United States* v. *Di Re*, 332 U. S. 581 (1948). Because the opinion of the court below was predicated upon the asumption that this search was lawful, I think that the judgment below must be reversed. If the Louisiana courts had reached the correct conclusion that the police officers had no authority to search petitioner, they might well have concluded that petitioner was within his rights under local law in resisting this unlawful search.

There are two relevant and related legal principles which the Louisiana courts might have drawn upon in considering this question. The first is the principle of self-defense, which was inferentially raised by petitioner in his appeal to the Criminal District Court and ex-

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[8] Cf. *United States* v. *Carignan*, 342 U. S. 36, 46 (1951); *Culombe* v. *Connecticut*, 367 U. S. 568, 631–632 (1961). Respondent, the City of New Orleans, urges that in 1958 it abandoned the practice of arresting for vagrancy pending investigation of other offenses. If this is so, the city is deserving of commendation. Irrespective of the general policy of the city, however, the instant case clearly demonstrates that the practice continues.

pressly noted in his application to the Louisiana Supreme Court. The idea that an individual cannot be held criminally responsible for acts done in reasonable defense of his person is deeply rooted in our jurisprudence. Self-defense has long been recognized in Louisiana,[9] and is now provided for by several sections of the State Criminal Code, one of which states:

> "The use of force or violence upon the person of another is justifiable, when committed for the purpose of preventing a forcible offense against the person . . . ; provided that the force or violence used must be reasonable and apparently necessary to prevent such offense . . . ." [10]

The Supreme Court of Louisiana has recently intimated that this defense is available to a defendant charged with aggravated assault upon a police officer, if the asserted assault was committed after the officer attempted unlawfully to arrest the defendant.[11] Whether such a defense is available against the disturbing-the-peace-by-assault charge upon which petitioner was convicted and

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[9] *State* v. *Chandler*, 5 La. Ann. 489 (1850); *State* v. *Scossoni*, 48 La. Ann. 1464, 21 So. 32 (1896); *State* v. *Baptiste*, 105 La. 661, 30 So. 147 (1901); *State* v. *Bolden*, 107 La. 116, 31 So. 393 (1902); *State* v. *Short*, 120 La. 187, 45 So. 98 (1907); *State* v. *Robinson*, 143 La. 543, 78 So. 933 (1918); *State* v. *Van Duff*, 146 La. 713, 84 So. 29 (1920). See generally Comment, Self-Defense in Louisiana—The Criminal Law and the Tort Law Compared, 16 Tulane L. Rev. 609 (1942).

[10] La. Rev. Stat. § 14:19. This statute has been broadly interpreted by the Louisiana Supreme Court. *State* v. *Rowland*, 246 La. 729, 167 So. 2d 346 (1964). See also La. Rev. Stat. §§ 14:18, 14:20, 14:21, 14:22.

[11] *State* v. *Tedeton*, 243 La. 1031, 150 So. 2d 4 (1963). However, the assault in the *Tedeton* case was found to have been committed *before* any attempted arrest.

whether the record in the instant case establishes such a defense are questions of Louisiana law.

The second principle which the state courts might regard as dispositive in this case was announced by the Louisiana Supreme Court in *City of Monroe* v. *Ducas*, 203 La. 971, 14 So. 2d 781 (1943):

> "The right of personal liberty is one of the fundamental rights guaranteed to every citizen, and any unlawful interference with it may be resisted. Every person has a right to resist an unlawful arrest; and, in preventing such illegal restraint of his liberty, he may use such force as may be necessary." [12]

Petitioner vigorously argued in the state courts that he had a right to resist the stationhouse search which he contended was unlawful, but the state courts never came to grips with this issue because they held he was then in "lawful police custody" pursuant to "a legal arrest." By virtue of the *City of Monroe* case, *supra*, it appears with unmistakable clarity that an individual in Louisiana has a right under state law reasonably to resist an unlawful arrest. Whether this state right encompasses the right to resist an unlawful search and whether the amount of resistance here was reasonable are questions of state law.

Since the state courts' appraisal of these crucial questions of state law was foreordained by their erroneous ruling that the search of petitioner was lawful, they should be permitted the opportunity to reconsider these questions. Accordingly, I would reverse the judgment below and remand this case to the Louisiana Supreme Court for further proceedings consistent with this opinion. Because I believe the question whether the police can

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[12] *City of Monroe* v. *Ducas*, 203 La. 971, 979, 14 So. 2d 781, 784 (1943). See also *Lyons* v. *Carroll*, 107 La. 471, 31 So. 760 (1902).

arrest someone on a trumped-up minor charge pending investigation of other crimes warrants this Court's condemnation, and because, unlike my Brethren, I do not find this record too opaque for what I consider a proper disposition, I respectfully dissent from the dismissal of the writ of certiorari as improvidently granted.

MR. JUSTICE DOUGLAS, dissenting.

If this case is to be decided by the traditional Fourth Amendment standards applicable prior to *Terry* v. *Ohio*, *ante*, p. 1, the question is whether a person who is unconstitutionally arrested must submit to a search of his person, or whether he may offer at least token resistance.

Police officers while cruising late one night saw petitioner standing on a street corner and concluded that he fitted the general description of a murder suspect. They accosted him and asked him to identify himself. He had no identification on his person, only at home. He gave the officers his name and address, and informed them that he was a law student. The officers told him he was being questioned because he fitted the description of a murder suspect who had on his left forearm a tattoo which read, "born to raise hell." The officers asked him to remove the coat he was wearing so they could check his forearm, but he refused. He was then "seized" and taken to the police station, where he was asked to remove his jacket. He refused, folding his arms and crouching in a corner. The officers then attempted to take his jacket off, each pulling on one arm. There was no battle or fracas of any consequence. Petitioner, however, did resist this attempt by moving about and by pushing one officer to one side and then pushing the other officer to the other side. But so far as the record shows no more violence happened than that produced by the combined efforts of petitioner and the officers which caused the officers to be butted around the room. He

did not strike at the officers, or kick them, and none of them had any marks or bruises or torn clothing.[1]

He was booked on three charges—vagrancy, resisting an officer, and reviling the police.

At the end of the State's case petitioner moved for dismissal of the charges. That ruling was held under advisement and petitioner was at once arraigned on three new charges, one of resisting an officer and two for disturbing the peace by assaulting an officer. The trial on

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[1] I do not, as my Brothers HARLAN and FORTAS suggest, consider the record too sketchy for determining the degree of force employed by petitioner in resisting the officers. The record discloses that no violence and little force were used by petitioner.

Lieutenant Martello, the officer apparently in charge of the station to which petitioner was taken, testified as follows:

"Mr. Wainwright refused to take his jacket off . . . so I instructed him I would have the jacket removed by the doorman.

"He again refused. He walked into a corner, grabbed his jacket by his hands, folding his arms, and he said, 'If you want this jacket off take it off.'

. . . . . .

"Officer O'Rourke and Officer Gilford asked him to take the jacket off and he didn't respond, so they physically took the jacket off of him. He done everything in his power to keep them from removing the jacket. In this operation the officers were bounced from wall to wall physically, and with the assistance of a couple of other police officers they put handcuffs on one of his arms, and they removed his jacket."

On cross-examination, Martello elaborated:

"Q. You testified that Mr. Wainwright crouched in a corner, held his jacket to him, now what did he do when Officers O'Rourke and Gilford tried to remove it?

"A. He tried to keep it on by holding it.

"Q. How?

"A. By folding his arms (demonstrates).

"Q. He didn't do anything else?

"A. No, not to my knowledge.

"Q. If Officer O'Rourke and Officer Gilford got thrown around the room, it was through their own effort?

"A. No, it was the combined effort of Mr. Wainwright in his

this second case was had and petitioner fined $25 on each charge or given 30 days in jail on each charge, the sentences being suspended. On appeal the conviction of resisting an officer was reversed, but his conviction on two charges of disturbing the peace was affirmed by the Criminal District Court and later by the Supreme Court of Louisiana, the complaint in the first case apparently being abandoned. While petitioner tried to get the appellate courts to incorporate the record in the first case into the record in the second, that was not done. But that defect has been remedied here, the transcripts of all the hearings now being before the Court.

The records before us do not even approach establishing probable cause for arrest. The officers had no warrant. They did not see petitioner commit any crime. There was no arrest which could be justified under the heading of vagrancy. That could be made use of only

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refusal to remove the jacket. Force was necessary to remove the jacket by the officers.

"Q. He didn't do anything but try to hold the jacket on?

"A. They tried to take it off, and he was trying to keep the jacket on.

"Q. He held very still?

"A. No, it was a struggle.

"Q. Did he strike out at the officers?

"A. No.

"Q. Did he kick the officers?

"A. I didn't see him. He could have. I didn't see him. It wasn't visible to me."

Later, in answer to a question posed by the court, Martello stated that none of the four officers who removed petitioner's jacket suffered any "marks, bruises, or torn clothing."

On cross-examination Officer O'Rourke testified as follows:

"Q. How was he [petitioner] pushing you around? Did he strike out at someone?

"A. No. Like a football player going through a line.

"Q. Did he try to run?

"A. No, dancing from wall to wall."

by the factor of loitering, but petitioner was seen standing still for only five to 10 seconds. To be sure he did not have identification papers on him and "very little funds." But those factors obviously could not be ingredients of a crime under our present system of government. Cf. *Thompson* v. *Louisville*, 362 U. S. 199.

It is plain that the officers "seized" petitioner to question him further concerning a murder. It is apparently on that ground that the Criminal District Court concluded that petitioner's arrest was "legal." But he was not arrested for murder or for any related offense, but only for vagrancy. The circumstances of this case show that the arrest was no more than arrest on suspicion,[2] which of course was unconstitutional—at least prior to *Terry* v. *Ohio*—and robs the search of any color of legality. *Henry* v. *United States*, 361 U. S. 98.

Under our authorities (cf. *Elk* v. *United States*, 177 U. S. 529, 534–535; and see *United States* v. *Di Re*, 332 U. S. 581, 594), at least prior to the ill-starred case of *Terry* v. *Ohio*, a citizen had the right to offer some resistance to an unconstitutional "seizure" or "search." Must he now stand quietly and supinely while officers "pat him down," whirl him around, and throw him in the wagon?

The present episode may be an insignificant one and the hurt to petitioner nominal. But the principle that a citizen can defy an unconstitutional act is deep in our system. *Thomas* v. *Collins*, 323 U. S. 516, 532–537.

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[2] What transpired after the arrest for vagrancy demonstrates that the officers merely suspected petitioner was involved in the murder because of a superficial resemblance to the wanted man. Officers testified that the reason they wished to remove petitioner's jacket after he was in custody was to see if his arm was tattooed—that is, to ascertain if petitioner's resemblance to the murder suspect was more than superficial.

When in a recent case (*Wright* v. *Georgia,* 373 U. S. 284, 291–292), it was said that "failure to obey the command of a police officer constitutes a traditional form of breach of the peace," we made a qualification: "Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution."

We should not let those fences of the law be broken down.

This case points up vividly the dangers which emanate from the Court's decision in *Terry* v. *Ohio,* the so-called "stop-and-frisk" case. If this case is to be decided by the new test of "searches" and "seizures" announced in that case, startling problems are presented. The officers here had no more than an unsubstantiated suspicion that petitioner was a murder suspect, a suspicion based only on a superficial resemblance between petitioner and the wanted man. Thus they had no right to "seize" petitioner. Is the case dismissed as improvidently granted because the officers had "reasonable suspicion" justifying the seizure, or reasonable grounds to believe that petitioner was armed and dangerous? These questions are not answered by the Court; and leaving them unanswered gives a new impetus to *Terry* v. *Ohio.* If this "seizure" was constitutional, then the sleepless professor who walks in the night to find the relaxation for sleep is easy prey to the police, as are thousands of other innocent Americans raised in the sturdy environment where no policeman can lay a hand on the citizen without "probable cause" that a crime has been or is about to be committed. That was the philosophy of Walt Whitman, Vachel Lindsay, and Carl Sandburg and it was faithfully reflected in our law.

The interest of society in apprehending murderers is obviously strong; yet when the manhunt is on, passions often carry the day. I fear the long and short of it is that

an officer's "seizure" of a person on the street, even though not made upon "probable cause," means that if the suspect resists the "seizure," he may then be taken to the police station for further inquisition. That is a terrifying spectacle—a person is plucked off the street and whisked to the police station for questioning and identification merely because he resembles the suspected perpetrator of a crime. I fear that with *Terry* and with *Wainwright* we have forsaken the Western tradition and taken a long step toward the oppressive police practices not only of Communist regimes but of modern Iran, "democratic" Formosa, and Franco Spain, with which we are now even more closely allied.

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MILLER *v.* CALIFORNIA.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

No. 154. Argued March 26, 1968.—Decided June 17, 1968.

245 Cal. App. 2d 112, 53 Cal. Rptr. 720, certiorari dismissed.

F. Lee Bailey argued the cause for petitioner. With him on the briefs was *Alan M. Dershowitz.*

Philip C. Griffin, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch,* Attorney General, and *William E. James,* Assistant Attorney General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE MARSHALL, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN join, dissenting.

The Court may leave this judgment standing only upon one or more of the following grounds: that there was no constitutional error in petitioner's trial; that whether or not there was error, objection to it was waived; or that the error was harmless. None of those grounds are persuasive to me, and I would reverse.

The facts of the case are as follows. A short time after midnight on October 8, 1964, petitioner's husband was killed in the conflagration of the automobile in which he and petitioner had been riding. Later that day, at about 1:30 p. m., petitioner was arrested for murder, and was taken to a county jail, where she was booked on that charge and placed in a cell. She was met at the jail by a lawyer, a family friend who had been called by

petitioner shortly after the fire. The night of her arrest petitioner spoke with a police officer for several hours at the jail, answering questions and reciting her version of what she claimed to have been an accidental fire.

In an attempt to prevent questioning of his client, petitioner's counsel set up, with his associates, a 24-hour-a-day watch of her cell. Thereafter, at about 11 p. m. on October 9, Peggy Fisk, an undercover agent in the employ of the county sheriff's office, was falsely booked into the jail on a fictitious narcotics charge and placed in petitioner's cell. Two other prisoners who had shared the cell were later removed. Fisk did not advise petitioner that she was an agent of the sheriff placed in the cell to report on anything petitioner might say. She remained alone with petitioner until October 15, giving oral reports as to their conversations from time to time to the sheriff's office; a written report was prepared on October 12 and partly on October 14.

On October 13, a complaint was filed formally charging petitioner with murder; petitioner was arraigned that day on the complaint.[1] An indictment was returned on October 20, and the complaint was then dismissed.

It was the State's theory at trial that petitioner did not love her husband; that she drugged him and then set the automobile on fire; and that she killed him in order to be free to marry one Arthwell Hayton and to collect some $100,000 in insurance proceeds. The defense theory was that the fire was of accidental, rather than incendiary, origin. The defense contended that although petitioner was in love with Hayton until her husband's death the affair between them had terminated several months earlier, petitioner had given up any thought of

[1] The judge on the same day issued an order prohibiting officials from questioning petitioner unless her attorney was present, and ordered her attorneys to cease sitting outside her cell. Apparently, the police did not inform the judge of Fisk's continued presence.

marrying Hayton, and had been reconciled with her husband; and that she would not be motivated to kill her husband for the insurance since he earned some $30,000 a year in his dental practice.

Fisk was called as a prosecution witness at trial and testified that petitioner told her in the cell after her arrest for murder that "she did not love her husband but she respected him"; that "she had always loved Mr. Hayton and still loves him"; that "she would receive over a hundred thousand dollars in insurance because of the accidental death"; and that "as soon as this mess was over, that she planned to take [her children] . . . away to Europe with the insurance money."

The district attorney relied upon and emphasized Fisk's testimony in his argument to the jury. See *infra*, at 628–629. After deliberating for more than three days, the jury returned a verdict that petitioner was guilty of murder in the first degree. She was later sentenced to life imprisonment.

I.

Although the issue is not free from difficulty, it seems to me the record clearly reveals petitioner adequately raised and preserved her federal constitutional objection to Fisk's testimony. That issue arises in the following context.

Toward the close of its case in chief, the prosecution called Fisk as a witness. Petitioner's trial counsel immediately objected, before Fisk was sworn, to her testimony at that time, on the ground that he had not been given her address prior to her testifying as he had been promised. There then occurred an extended conference in the judge's chambers.

In chambers, petitioner's counsel made two objections to Fisk's testimony. He first discussed the objection raised in the presence of the jury that he had not been given the witness' address as he had been promised, so

that he might interview her. He then presented extensively the constitutional objection to any testimony at all from Fisk, discussing the circumstances giving rise to the contention and citing the relevant cases.[2] The district attorney first explained why he had been unable to provide counsel with Fisk's address and acknowledged that he had forgotten the request, which was apparently based on the fact that defense counsel had been shown, a month or so earlier, a report of the sheriff concerning the witness in which she had been identified as "Jackie Doe." He attempted to distinguish the cases cited by petitioner's counsel, and elaborated somewhat on Fisk's activities.[3]

As to the first ground of objection, the trial judge said "in view of the circumstances related that Mr. Foley [defense counsel] was promised an opportunity to talk to this witness," Fisk should be withdrawn at that time. The district attorney agreed to withdraw her. The trial judge then turned to the constitutional ground of objection. It had been clearly disclosed at the conference that Fisk spent almost a week in petitioner's cell, without disclosing her identity, and would testify concerning statements made to her by petitioner. The district attorney said he would call her as a witness the next day and stated to the judge, as to petitioner's constitutional objection: "You would have to wait and listen to

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[2] Counsel cited by name and discussed, as did the district attorney, *Massiah* v. *United States*, 377 U. S. 201 (1964), and *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361 (1965). The latter decision, grounded on the Federal Constitution, encompasses a claim based on *Escobedo* v. *Illinois*, 378 U. S. 478 (1964).

[3] The district attorney represented that Fisk, although being with petitioner "for about a week," did not interrogate petitioner or in any way seek to elicit information from her. Although that representation was undoubtedly made in good faith at the time, it is conceded to be incorrect. See *infra*, at 626.

the voir dire on the stand and see." The following colloquy, concluding the in-chambers conference, ensued:

> "The COURT: . . . [Y]ou will have the opportunity to talk to her but on the other objection, we would have to have her sworn and at least testify to the preliminary questions anyway, and have an objection made at the proper time.
>
> "Mr. FOLEY: You know that isn't right, your Honor.
>
> "The COURT: Unless you want me to look at this [sheriff's] report and see what she knows. Does this report indicate?
>
> "Mr. TURNER [district attorney]: There has to be a foundation laid, an objection made. There is no way to—
>
> "The COURT: I think there would have to be. I don't see how that could be done *in the absence of the jury.*" (Emphasis added.)

The following day Fisk was called as a witness. The district attorney asked some preliminary questions. Fisk was identified as having been employed the previous October by the county sheriff as an undercover agent, and it was elicited that in the course of that employment she was assigned the task of pretending to be a prisoner in jail with petitioner, where she became acquainted and talked with her. When the district attorney asked Fisk if petitioner had discussed her "domestic problems with her husband," counsel for petitioner asked if he might "ask a question on voir dire." He elicited that Fisk had not identified herself as a police agent to petitioner, and had not advised petitioner she could have an attorney present when they talked. Direct examination was then resumed by the district attorney. Fisk then testified concerning petitioner's statements to her, see *supra,* at 618.

On cross-examination, petitioner's counsel elicited answers concerning Fisk's being placed in petitioner's cell, reporting to the sheriff, and activities in the cell (see *infra,* at 626). He also elicited that petitioner had told Fisk the fire was accidental, and, in short, a story concerning her husband's death consistent with that which petitioner had related to the police at the scene and in questioning at the jail, and consistent with petitioner's claim of innocence.

In these circumstances respondent contends that it is "obvious" that petitioner's trial counsel, following his interview with Fisk, made a tactical judgment that her testimony would be helpful, and therefore that the federal claim is not available to petitioner here because it was waived. I find that view unacceptable.

The District Court of Appeal clearly agreed that petitioner's federal contention based on our decisions in *Massiah* and *Escobedo* was valid. 245 Cal. App. 2d 112, 144, 53 Cal. Rptr. 720, 740. The court stated it did not reverse the conviction only because it viewed Fisk's testimony as nonprejudicial. *Ibid.* However, it went on to say that petitioner waived the point by failing to object when Fisk was called the day following the in-chambers conference, or, to put it another way, that "it is reasonable to assume that defense counsel was willing to have Peggy [Fisk] testify" in the circumstances. 245 Cal. App. 2d, at 143, 53 Cal. Rptr., at 740.[4] I think it significant to note that the Supreme Court of

[4] One factor recited by the court as leading it to conclude that petitioner's counsel desired Peggy Fisk's testimony was that he "received a copy of Peggy's reports to her superiors concerning her talks with defendant," and, apparently, was in a position to balance its advantages and disadvantages. 245 Cal. App. 2d, at 143, 53 Cal. Rptr., at 740. The record does not reveal that sheriff's report, but it does show that counsel had seen it prior to objecting strenuously at the in-chambers conference to Fisk's testifying.

California specifically disapproved the language of the District Court of Appeal in this case with respect to waiver of objections to admission of evidence obtained in violation of *"Escobedo-Dorado"* by a mere failure to object, see *People* v. *Doherty*, 67 Cal. 2d 9, 14, 429 P. 2d 177, 180 (1967), and in the same decision cast considerable doubt on the approach of the District Court of Appeal in this case toward presuming or assuming that the failure to object was a considered trial stratagem.[5]

In any event, this Court has long held that a waiver of a federal constitutional right is not lightly to be presumed. See, *e. g.*, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). In this case counsel clearly apprised the trial court of the basis of his objection, and indeed he cited the specific decisions that clearly supported the claim. Surely there was no bypassing of the state courts on the issue.

Concerning the failure to renew the objection, I note that the trial judge appears clearly to have required petitioner to raise the issue anew in front of the jury and after preliminary questions had been asked of Fisk. On this record those preliminary questions clearly identified her as having engaged in conversations with petitioner as an undercover agent in the jail pretending to be a fellow prisoner. As petitioner's trial counsel said in a motion for a new trial: "The defendant was then placed in the unfortunate position of being forced to object in front of the jury. If the objection were sustained, the jury might well . . . infer that through a technicality the defendant had managed to keep out of evidence a full confession."

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[5] In the *Doherty* case, the California Supreme Court said, in a situation where counsel might develop facts upon which an objection could be based but did not object (in relation to that court's *Dorado* decision), not that it would assume waiver of the point, but rather that "[i]f the People should sustain the burden of establishing the fact of such tactics, we would treat defendant's stratagem as a waiver of the objection." 67 Cal. 2d, at 14, n. 4, 429 P. 2d, at 180, n. 4.

Thus the most that can be said on this record is that trial counsel—having previously raised the objection—preferred to have Fisk's testimony admitted rather than objecting to it in the presence of the jury after Fisk had been identified. Cf. *Jackson* v. *Denno*, 378 U. S. 368 (1964); *People* v. *Schader*, 62 Cal. 2d 716, 727–728, 401 P. 2d 665, 672 (1965). Placing a defendant in that kind of a dilemma with respect to renewing a federal constitutional objection serves no valid purpose. *Douglas* v. *Alabama*, 380 U. S. 415, 422 (1965). And while respondent indicates here that California law permits a defendant to object to the admission of evidence and establish a basis for the objection outside the presence of the jury (citing *Schader*, *supra*), that was neither the import of the trial judge's ruling in this case nor the view of the district attorney at this trial (see *supra*, at 619–620).

Since the record reveals the trial court and the prosecution were clearly apprised of the constitutional claim, since the state court at least alternatively passed upon the validity of that claim, and since it cannot be said on the record that the failure to renew the objection was anything more than a decision reflecting the trial judge's ruling that the objection be voiced before the jury, I should think it perfectly clear that the issue was adequately preserved.[6]

II.

Notwithstanding that respondent's own courts viewed Fisk's placement and activities in petitioner's cell as unconstitutional, respondent here attempts to defend the sheriff's action on two grounds, both of which are patently without substance.

Respondent contends that petitioner's constitutional rights were not violated, because Fisk was placed in the

[6] Cf. *Fay* v. *Noia*, 372 U. S. 391, 438–440 (1963). Compare *Henry* v. *Mississippi*, 379 U. S. 443 (1965).

cell prior to any formal charge being filed against petitioner. To be sure, it is emphasized in *Massiah* v. *United States*, 377 U. S. 201, 204–206 (1964), that the defendant there had been indicted and that an indictment marks a point at which the formal adversary process begins. Thus, the Court held that statements obtained on behalf of the prosecution by a co-conspirator of the defendant during conversations in the former's automobile, violated the defendant's Sixth Amendment right to counsel[7] since he had been indicted and was already represented by counsel. At the same Term, the failure to honor the right to counsel was recognized at an earlier stage in respect to interrogations, namely, when, among other things, "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect . . . ." *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964). That language applies here. Petitioner had been arrested and booked for murder. Clearly, given the circumstances of the fire, if a crime had been committed, petitioner had done it. In practical effect the criminal proceedings had begun, for it is clear from the arrest, from petitioner's initial questioning, and from the decision to use Fisk that the sheriff's office had ceased merely a general inquiry into the cause of the fire.[8]

Indeed, in one respect at least, this is a clearer case than *Massiah:* unlike the defendant there, who had been released on bail, petitioner was in custody without bail, with a consequent lack of freedom to choose her companions. And petitioner, like the defendants in *Massiah* and *Escobedo*, was represented by counsel at all times. Moreover, a formal complaint charging petitioner with

[7] At the same Term, *Massiah* was applied to vacate a state judgment affirming a conviction. *McLeod* v. *Ohio*, 378 U. S. 582 (1964). See also *McLeod* v. *Ohio*, 381 U. S. 356 (1965).

[8] Cf. *Hoffa* v. *United States*, 385 U. S. 293, 309–310 (1966).

murder was filed on October 13, and Fisk remained in petitioner's cell, eliciting information or conversing with petitioner until October 15.[9]

Both state courts, see, *e. g.*, *People* v. *Flores*, 236 Cal. App. 2d 807, 46 Cal. Rptr. 412 (1965), cert. denied, 384 U. S. 1010 (1966) (jail cell plant); *People* v. *Ludlum*, 236 Cal. App. 2d 813, 46 Cal. Rptr. 375 (1965), and lower federal courts, see, *e. g.*, *Clifton* v. *United States*, 341 F. 2d 649 (C. A. 5th Cir. 1965), have held that the right to counsel as interpreted in *Massiah* and *Escobedo* bars the admission of statements obtained at some pre-indictment point, at least when the accusatory stage has been reached and the police have clearly focused upon the subject.[10] However that stage be defined, it was clearly reached here.

Respondent also contends that petitioner's constitutional rights were not violated, because Fisk engaged in no "process of interrogations," *Escobedo* v. *Illinois*, 378 U. S., at 491, designed to obtain a confession from petitioner, or that statements from her had not been "deliberately elicited," *Massiah* v. *United States*, 377 U. S., at 206. In the State's view, so long as Fisk acted simply as a listening post, she could testify as to any statements made to her by petitioner. That view was, however, rejected in *Massiah* itself. The Government in that case pointed to the fact that the record did not reveal that its agent had induced the defendant by persuasion (there based on friendship) to discuss his activities, and urged that "providing a defendant an opportunity to talk" [11] did not violate his right to counsel. See also *Beatty* v.

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[9] See n. 12, *infra*.

[10] Cf. *People* v. *Robinson*, 16 App. Div. 2d 184, 224 N. Y. S. 2d 705 (4th Dept. 1962) (jail cell plant). See also Note, 79 Harv. L. Rev. 935, 1006 (1966).

[11] Brief for the United States, *Massiah* v. *United States*, No. 199, October Term, 1963, at 30.

United States, 389 U. S. 45 (1967), reversing 377 F. 2d 181 (C. A. 5th Cir.).

At all events, Fisk was not put in the cell to discuss the weather, to console petitioner, or merely to provide her with companionship. Her presence itself was an inducement to speak, and an inducement by a police agent. While petitioner's statements to her were not obtained by coercive means, they certainly were not given, in light of the deception, through a knowing and intelligent waiver of petitioner's rights.

Furthermore, it is clear on this record that Fisk was planted in petitioner's cell in order to subvert her right to counsel, with the express purpose of attempting to obtain evidence out of her mouth. On one occasion, Fisk was given a newspaper clipping concerning the case and was told to show it to petitioner, which she did with some accompanying statement, such as the press is "ruining you." On another occasion, pursuant to instructions, Fisk told petitioner of a conversation that she had supposedly overheard in a hall between four men whom she thought were from the district attorney's office, in which one of the men, as the ruse went, said: "Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case." Fisk also told petitioner "I put all my trust in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same." Finally, Fisk said that she had at one time been represented by an attorney who "did not do me much good" and indicated that perhaps petitioner should suspect hers.[12]

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[12] Respondent also argues that petitioner did not show that any of her statements as related by Fisk occurred prior to the filing of a formal charge on October 13, or were specifically prompted by the four incidents of deliberate inducements to speak related in the text above. Of course petitioner has no such burden in the circumstances of this case. Besides, petitioner's counsel asked Fisk, for example, "which day was it that she [petitioner] mentioned insur-

Such deliberate police deception and subversion of a defendant's rights should not be condoned. The District Court of Appeal said in this case:

> "It is almost incredible that in these days of enlightened treatment by prosecution authorities of persons charged with crime, the Peggy Fisk incident could have occurred. . . .
>
> . . . . . .
>
> "The trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and to get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney was completely indefensible . . . ." (245 Cal. App. 2d, at 141, 143–144, 53 Cal. Rptr., at 738, 740.[13])

I agree, and I would not leave standing a judgment reflecting such an egregious violation of *Massiah* and *Escobedo*.[14]

III.

Having concluded that petitioner properly preserved her federal constitutional objection to the admission of Fisk's testimony, and that its admission did indeed violate her constitutional rights, I turn to respondent's contention that the error was "harmless beyond a reason-

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ance money to you, 9th, 10th, 11th, 12th, 13th or 14th?" Fisk was unable to answer. Moreover, assuming all the statements were made on the first day of Fisk's deceptive presence in the cell, I would reach the same result.

[13] In addition to the other cited cases (see *supra*, at 625) in which the admission of testimony by jail cell undercover agents was held to be unconstitutional, see *People* v. *Arguello*, 63 Cal. 2d 566, 407 P. 2d 661 (1965).

[14] Petitioner's trial, which began on January 11, 1965, was prior to the effective date of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and therefore that decision is not applicable. See *Johnson* v. *New Jersey*, 384 U. S. 719, 734 (1966).

able doubt," *Chapman* v. *California*, 386 U. S. 18, 24 (1967). *Chapman* was decided after the decision of the California District Court of Appeal now on review here, and normally a remand would be in order so that the state court might reconsider, in light of that case, its conclusion that the error was harmless. However, since a majority of the Court refuses to decide this case at all, I wish to point out why I cannot regard the error as harmless.

I have already indicated generally the theories of the prosecution and defense as to Dr. Miller's death (see *supra*, at 617–618). The evidence against petitioner was circumstantial.[15] So saying, I do not imply it was necessarily in any sense weak; that fact does, however, help to indicate why the issue of motive was particularly crucial, and one which was central to the trial. Fisk's testimony definitely supported the State's case on that issue. Petitioner testified that she loved Hayton until "the minute that Cork [Dr. Miller] was gone," but that she had given up any idea of marrying Hayton as of the time of an incident that occurred approximately three months prior to her husband's death. As to that testimony, the district attorney argued to the jury:

> "But that's not what she told the girl [Fisk] up in jail. She told the girl up in jail that she still loved Hayton, felt that he would come to her."

On rebuttal argument, the district attorney again emphasized Fisk's testimony:

> "He [defense counsel] says the prosecution's case is based entirely on surmise and conjecture. That's not true.
>
> . . . . . .

[15] See *Fontaine* v. *California*, 390 U. S. 593; cf. *Anderson* v. *Nelson*, 390 U. S. 523.

"Is it surmise and conjecture that Mrs. Miller had been infatuated with Hayton and wanted to marry him?

"There is disagreement as to when this wanting to marry him stopped, but there is no question at all that she wanted to marry him.

. . . . . .

"Is it surmise and conjecture that she told the girl up in jail she still loved Hayton and did not love her husband?

. . . . . .

"And, of course, right after her husband's death she is arrested and is in custody, and she tells the girl upstairs that she still loves Hayton."

To be sure, for almost each point upon which Fisk's testimony was emphasized there was other supporting evidence. But this Court has always viewed evidence out of a defendant's own mouth, obtained after the events, as particularly weighty with the jury. See *Bram* v. *United States*, 168 U. S. 532 (1897); *Jackson* v. *Denno*, 378 U. S. 368 (1964). And, as the quotations above indicate, that was plainly the view of the district attorney in this case. Certainly Fisk's testimony, if believed, made the prosecution's case much more credible, and undermined petitioner's defense.

Moreover, the jury deliberated three days before reaching a verdict. It may have spent that time assessing the expert testimony in regard to the causes of fires in automobiles, weighing the prosecution's experts' testimony that this fire was of incendiary origin against the testimony of an expert for the defense, who said the fire might well have been accidental. It may have found all that time necessary to resolve the question of guilt or innocence. Or, since it was charged on both first- and second-degree murder, it might have spent that time weighing

not guilt and innocence but degree of guilt, even though only the former would have been consistent with the prosecution's theory. Fisk's testimony may have been particularly important with respect to the jury's resolution of that matter. While of course one cannot know definitely what occupied the jury's time during the three days it deliberated, I am convinced it cannot be said "beyond a reasonable doubt," *Chapman* v. *California, supra,* that there is no "reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut,* 375 U. S. 85, 86–87 (1963). I would therefore reverse petitioner's conviction.

DeSTEFANO *v.* WOODS, SHERIFF.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 559. Decided June 17, 1968.*

In post-conviction proceedings petitioners unsuccessfully challenged the constitutional validity of their convictions in the state courts—petitioner in No. 941 contending that it was unconstitutional for the trial court to have instructed the jury (under a state constitutional provision applicable to noncapital cases) that it could return a guilty verdict by less than a unanimous vote; and petitioner in No. 559 contending that he was unconstitutionally denied a trial by jury when he was tried by a state court for criminal contempt, adjudged guilty, and sentenced to three concurrent one-year terms. *Held:* This Court's decisions of May 20, 1968, in *Duncan* v. *Louisiana,* 391 U. S. 145, holding that the States cannot deny a request for jury trial in serious criminal cases, and *Bloom* v. *Illinois,* 391 U. S. 194, holding that the right to jury trial extends to trials for serious criminal contempts, do not apply retroactively; and since petitioners' trials were instituted before that date the Court does not reach the issues presented by petitioners.

Certiorari granted; No. 559, 382 F. 2d 557, and No. 941, affirmed.

Anna R. Lavin for petitioner in No. 559.

John J. Stamos and *Elmer C. Kissane* for respondent in No. 559.

Robert Y. Thornton, Attorney General of Oregon, and *David H. Blunt,* Assistant Attorney General, for respondent in No. 941.

PER CURIAM.

Petitioner Carcerano was convicted of armed robbery and sentenced, on May 11, 1962, to life imprisonment. The Oregon Constitution, Art. I, § 11, permits a jury

*Together with No. 941, *Carcerano* v. *Gladden, Warden,* on petition for writ of certiorari to the Supreme Court of Oregon.

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to convict in noncapital cases if 10 of the 12 jurors support conviction. The Oregon Supreme Court affirmed petitioner's conviction. 238 Ore. 208, 390 P. 2d 923, cert. denied, 380 U. S. 923. In 1967, petitioner sought collateral relief under Oregon's post-conviction statute. The sole ground relied upon was that the State and Federal Constitutions were violated when the jury was told it could return a verdict of guilty even though the members did not unanimously favor that verdict. This issue had not been raised by petitioner on his direct appeal. The Oregon Supreme Court denied relief.

Petitioner DeStefano was found in criminal contempt of an Illinois court and sentenced to three concurrent one-year terms.[1] After affirmance by the Illinois Supreme Court and denial of certiorari by this Court, 385 U. S. 989, petitioner unsuccessfully sought state collateral relief and then filed a petition for habeas corpus in the District Court for the Northern District of Illinois. Petitioner's contention was that he was unconstitutionally denied trial by jury. Both the District Court and the Court of Appeals held that the Constitution did not require jury trial for state criminal contempt proceedings.

In *Duncan* v. *Louisiana*, 391 U. S. 145, we held that the States cannot deny a request for jury trial in serious criminal cases, and in *Bloom* v. *Illinois*, 391 U. S. 194, that the right to jury trial extends to trials for serious criminal contempts. *Duncan* left open the question of

[1] Petitioner DeStefano was ordered released on bail by Mr. Justice Clark pending his direct appeals in the Illinois courts and his first petition for a writ of certiorari. He was again granted release on bail by Mr. Justice Clark pending his appeal to the Court of Appeals from the District Court's denial of habeas corpus relief; this second bail order has continued in force pending consideration of the present petition. Prior to the first bail order, and between the first denial of certiorari and the second bail order, petitioner served a total of 207 days of his concurrent one-year sentences.

the continued vitality of the statement in *Maxwell* v. *Dow*, 176 U. S. 581, 586, that the Sixth Amendment right to jury trial includes a right not to be convicted except by a unanimous verdict. Both *Duncan* and *Bloom* left open the question whether a contempt punished by imprisonment for one year is, by virtue of that sentence, a sufficiently serious matter to require that a request for jury trial be honored. These two issues posed in Nos. 941 and 559 must be considered at this time only if the decisions in *Duncan* and *Bloom* apply retroactively. We hold, however, that *Duncan* v. *Louisiana* and *Bloom* v. *Illinois* should receive only prospective application. Accordingly, the denials of collateral relief to petitioners must be affirmed regardless of whether, for cases to which the rules announced in *Duncan* and *Bloom* apply, the Fourteenth Amendment requires unanimous jury verdicts and affords a right to jury trial for criminal contempts punished by imprisonment for one year.

In *Stovall* v. *Denno*, 388 U. S. 293, 297, the Court stated the considerations that affect the judgment whether a case reversing prior doctrines in the area of the criminal law should be applied only prospectively:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

All three factors favor only prospective application of the rule stated in *Duncan* v. *Louisiana*. *Duncan* held that the States must respect the right to jury trial because in the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial generally tends to prevent arbitrariness and repression. As we stated in *Duncan*, "We would not assert, however, that every criminal trial—

or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." 391 U. S., at 158. The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. Second, States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States. *E. g., Maxwell* v. *Dow, supra.* Several States denied requests for jury trial in cases where jury trial would have been mandatory had they fallen within the Sixth Amendment guarantee as it had been construed by this Court. See *Duncan* v. *Louisiana, supra,* at 158, n. 30. Third, the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now accepting the Sixth Amendment guarantee. For example, in Louisiana all those convicted of noncapital serious crimes could make a Sixth Amendment argument. And, depending on the Court's decisions about unanimous and 12-man juries, all convictions for serious crimes in certain other States would be in jeopardy.

The considerations are somewhat more evenly balanced with regard to the rule announced in *Bloom* v. *Illinois.* One ground for the *Bloom* result was the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt. Unlike the judge, the jurymen will not have witnessed or suffered the alleged contempt, nor suggested prosecution for it. However, the

tradition of nonjury trials for contempts was more firmly established than the view that States could dispense with jury trial in normal criminal prosecutions, and reliance on the cases overturned by *Bloom* v. *Illinois* was therefore more justified. Also, the adverse effects on the administration of justice of invalidating all serious contempt convictions would likely be substantial. Thus, with regard to the *Bloom* decision, we also feel that retroactive application is not warranted.

For these reasons we will not reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968, the date of this Court's decisions in *Duncan* v. *Louisiana* and *Bloom* v. *Illinois*.[2] The petitions for writs of certiorari are granted and the judgments are affirmed. *It is so ordered.*

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would deny certiorari for the reasons stated in MR. JUSTICE HARLAN's dissenting opinions in *Duncan* v. *Louisiana*, 391 U. S. 145, 171, and *Bloom* v. *Illinois*, 391 U. S. 194, 215.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, dissenting.

I am of the view that the deprivation of the right to a trial by jury should be given retroactive effect, as I thought should have been done with comparable constitutional decisions. See *Gideon* v. *Wainwright*, 372 U. S. 335; *Douglas* v. *California*, 372 U. S. 353; *Linkletter* v. *Walker*, 381 U. S. 618, 640 (dissenting opinion); *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (dissenting opinion); *Stovall* v. *Denno*, 388 U. S. 293, 302 (dissenting opinion).

[2] We see no basis for a distinction between convictions that have become final and cases at various stages of trial and appeal. See *Stovall* v. *Denno*, *supra*, at 300–301.

LEE ART THEATRE, INC. *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 997. Decided June 17, 1968.

Admission in evidence of allegedly obscene motion picture films seized under the authority of a warrant issued by a justice of the peace on a police officer's affidavit giving the films' titles, and stating that he had determined from personal observation of the films and of the theatre's billboard that they were obscene, was erroneous, as the issuance of the warrant without the justice of the peace's inquiry into the factual basis for the officer's conclusions fell short of constitutional requirements demanding necessary sensitivity to freedom of expression.

Certiorari granted; judgment reversed and remanded.

Plato Cacheris for petitioner.

James B. Wilkinson for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. Petitioner, operator of a motion picture theatre in Richmond, Virginia, was convicted in the Hustings Court of Richmond of possessing and exhibiting lewd and obscene motion pictures in violation of Title 18.1–228 of the Code of Virginia. The Supreme Court of Appeals of Virginia refused a writ of error.

The films in question were admitted in evidence over objection that they had been unconstitutionally seized. The seizure was under the authority of a warrant issued by a justice of the peace on the basis of an affidavit of a police officer which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard in front of the theatre that the films were obscene.

The admission of the films in evidence requires reversal of petitioner's conviction. A seizure of allegedly obscene books on the authority of a warrant "issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered . . . obscene," was held to be an unconstitutional seizure in *Marcus* v. *Search Warrant*, 367 U. S. 717, 731–732. It is true that a judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture there. However, we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure "designed to focus searchingly on the question of obscenity," *id.*, at 732, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See *Freedman* v. *Maryland*, 380 U. S. 51, 58–59.

The judgment of the Supreme Court of Appeals of Virginia is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE STEWART base their concurrence in the judgment of reversal upon *Redrup* v. *New York*, 386 U. S. 767.

MR. JUSTICE HARLAN, dissenting.

A police officer filed a sworn affidavit that he had personally witnessed the commission of a crime, to wit, the possession and exhibition of obscene motion pictures. He was granted a warrant to seize the pictures, and did so.

In *Marcus* v. *Search Warrant*, 367 U. S. 717, officers were given a general warrant to seize obscene materials, pursuant to which they selected and seized 11,000 copies of 280 publications most of which were later found non-obscene. With barely a nod to the difference between 11,000 books and magazines selected for seizure by the officers themselves after a warrant had been issued and two obscene movies named in the affidavit, the Court reverses the present conviction on the authority of *Marcus*.

I think that *Marcus* was correctly decided, but I cannot discern its application here. Police officers may not be given *carte blanche* to seize, but they may certainly seize a specifically named item on probable cause, before the work "taken as a whole" has been adjudicated obscene. Any other rule would make adjudication not merely "not as easily arrange[d]" in the case of movies but quite impossible. If the Court means only that the officer should not merely say that he has seen a movie and considers it obscene, but should offer something in the way of a box score of what transpires therein, I consider it absurd to think that a magistrate, armed with the luminous guidance this Court has afforded, will be thus able to make a better judgment of probable obscenity.

Since the petitioner does not contend that the movies in question here were not obscene, I find it unnecessary to reach the point relied on by my Brothers BLACK, DOUGLAS, and STEWART.

HOUGHTON *v.* SHAFER, GOVERNOR OF PENNSYLVANIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 668, Misc. Decided June 17, 1968.

Petitioner, a Pennsylvania state prisoner, brought this action in the District Court claiming that prison authorities had violated § 1 of the Civil Rights Act of 1871 by confiscating legal materials which petitioner had acquired for pursuing his appeal but which, in alleged violation of prison rules, were in another prisoner's possession. The District Court dismissed petitioner's complaint on the ground that petitioner had not exhausted certain state administrative remedies. *Held:* It was not necessary for petitioner to resort to these state remedies in light of this Court's decisions in *Monroe* v. *Pape*, 365 U. S. 167, 180–183, and other cases.

Certiorari granted; 379 F. 2d 556, reversed and remanded.

William C. Sennett, Attorney General of Pennsylvania, *Frank P. Lawley, Jr.*, Deputy Attorney General, and *Edward Friedman* for respondents.

PER CURIAM.

Petitioner was convicted of burglary and is serving a sentence of four to 10 years in a Pennsylvania state prison. In pursuing his appeal *pro se* petitioner acquired law books, trial records, and other materials with the consent of prison authorities. Before petitioner had filed his appeal brief, prison authorities confiscated these materials because they were found in the possession of another inmate. Petitioner's efforts to obtain the return of the materials were not successful, and he commenced this action in the United States District Court, claiming that the prison authorities had violated § 1 of the Civil Rights Act of 1871, 17 Stat. 13, now 42 U. S. C. § 1983, by depriving him of his legal materials. The District Court

dismissed the complaint on the sole ground that petitioner had not alleged exhaustion of state administrative remedies, citing *Gaito* v. *Prasse*, 312 F. 2d 169 (C. A. 3d Cir.). The Court of Appeals for the Third Circuit affirmed without opinion. We grant the petition for certiorari and reverse the judgment of the Court of Appeals.

Petitioner's legal materials were confiscated pursuant to prison rules forbidding the possession of articles not sold through the canteen or approved by the authorities and forbidding the unauthorized loaning of books to another inmate. According to the inmates' handbook, petitioner could have taken his problem to the "Classification and Treatment Clinic"; it was also his privilege "to address a communication at any time to the Superintendent, the Deputy Commissioner of Correction, or the Commissioner of Correction, and as a final appeal, to the Attorney General." Petitioner did seek relief from the Deputy Superintendent of his prison, but without result. He was told, he says, to "leave well enough alone." His mother's telephone calls and correspondence with prison authorities were likewise unavailing. He has not, however, taken an appeal to the Deputy Commissioner of Correction, the Commissioner, or to the Attorney General.

As we understand the submission of the Attorney General of Pennsylvania in this Court, the rules of the prison were validly and correctly applied to petitioner; these rules are further said to be strictly enforced throughout the entire correctional system in Pennsylvania. In light of this it seems likely that to require petitioner to appeal to the Deputy Commissioner of Correction, the Commissioner, or to the Attorney General would be to demand a futile act. In any event, resort to these remedies is unnecessary in light of our decisions in *Monroe* v. *Pape*, 365 U. S. 167, 180–183; *McNeese* v. *Board of Education*, 373 U. S. 668, 671; and *Damico* v. *California*, 389 U. S.

416. On the basis of these decisions, but without intimating any opinion on the merits of the underlying controversy concerning the prison rules, the motion to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment of the Court of Appeals is reversed and the case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

CHAN KWAN CHUNG *v.* IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 637. Decided June 17, 1968.

381 F. 2d 542, affirmed.

Abraham Lebenkoff for petitioner.

Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg, and *Julia P. Cooper* for respondent.

PER CURIAM.

The judgment is affirmed.

CITY OF WILLIAMSPORT ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 1401. Decided June 17, 1968.

282 F. Supp. 46, affirmed.

Gordon P. MacDougall and *Harvey Gelb* for appellants.

Solicitor General Griswold, Acting Assistant Attorney General Zimmerman, Howard E. Shapiro, Robert W. Ginnane, and *Jerome Nelson* for the United States et al., and *Carl Helmetag, Jr.,* for Penn Central Co., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

GOLDMAN *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1261. Decided June 17, 1968.

21 N. Y. 2d 152, 234 N. E. 2d 194, appeal dismissed.

Robert E. Goldman and *Stephen R. Wiener* for appellant.

Frank S. Hogan and *H. Richard Uviller* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the judgment should be reversed.

RHODES *v.* COOK.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 1283. Decided June 17, 1968.

72 Wash. 2d 436, 433 P. 2d 677, appeal dismissed.

E. A. Niemeier, Frank A. Bauman, John K. Mallory, Jr., and *R. Michael Duncan* for appellant.

John F. Wilson for appellee.

Harry R. Calbom, Jr., for Pay'n Pak Stores, Inc., et al., as *amici curiae,* in support of appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS dissents.

HARPER *v.* MICHIGAN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 1103, Misc. Decided June 17, 1968.

379 Mich. 440, 152 N. W. 2d 645, appeal dismissed.

Frank J. Kelley, Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

CARRILLO *v.* CRAVEN, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1201, Misc. Decided June 17, 1968.

Certiorari granted; vacated and remanded.

Thomas C. Lynch, Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edsel W. Haws* and *John Fourt,* Deputy Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Peyton* v. *Rowe,* 391 U. S. 54.

VIALPANDO *v.* PATTERSON, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 1208, Misc. Decided June 17, 1968.

Certiorari granted; 382 F. 2d 588, vacated and remanded.

Duke W. Dunbar, Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *James F. Pamp,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Peyton* v. *Rowe,* 391 U. S. 54.

CATON *v.* ALABAMA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 1203, Misc. Decided June 17, 1968.

Certiorari granted; 281 Ala. 486, 205 So. 2d 239, reversed.

MacDonald Gallion, Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Douglas* v. *California,* 372 U. S. 353, and *Griffin* v. *Illinois,* 351 U. S. 12.

COOK *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 1233, Misc. Decided June 17, 1968.

Certiorari granted; reversed.

Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg, and *Edward Fenig* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Sanders* v. *United States,* 373 U. S. 1.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART dissent and would deny certiorari.

HEARD ET AL. *v.* RIZZO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 1530, Misc. Decided June 17, 1968.*

281 F. Supp. 720, affirmed.

Lois G. Forer for appellants in No. 1530, Misc. *William Kunstler* for appellants in No. 1662, Misc.

PER CURIAM.

The motion to affirm is granted and the judgments are affirmed.

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*Together with No. 1662, Misc., *Traylor et al.* v. *Rizzo et al.,* also on appeal from the same court.

SINGER *v.* MYERS, CORRECTIONAL SUPERINTENDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 1485, Misc. Decided June 17, 1968.

Certiorari granted; 384 F. 2d 279, reversed.

Peter Hearn for petitioner.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Jackson* v. *Denno*, 378 U. S. 368, and *Roberts* v. *LaVallee*, 389 U. S. 40.

LOPINSON *v.* PENNSYLVANIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 1133. Decided June 17, 1968.*

Certiorari granted; No. 1133, 427 Pa. 284, 234 A. 2d 552; No. 1095, Misc., 427 Pa. 72, 233 A. 2d 542; and No. 1700, Misc., vacated and remanded.

Lester J. Schaffer for petitioner in No. 1133, and *Howard M. Nazor* and *Gordon L. Nazor* for petitioner in No. 1700, Misc.

Michael J. Rotko and *Arlen Specter* for respondent in No. 1133; *Mr. Rotko, William H. Wolf, Jr.*, and *Mr.*

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*Together with No. 1095, Misc., *Coyle* v. *Pennsylvania;* and No. 1700, Misc., *Pruett* v. *Ohio*, both on petitions for writs of certiorari. No. 1095, Misc., is to the Supreme Court of Pennsylvania, and No. 1700, Misc., to the Supreme Court of Ohio.

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Specter for respondent in No. 1095, Misc.; and *Joseph E. Mahoney* for respondent in No. 1700, Misc.

PER CURIAM.

The motions for leave to proceed *in forma pauperis* in No. 1095, Misc., and No. 1700, Misc., are granted and the petitions for writs of certiorari in all three cases are granted. Without reaching the petitioners' other claims, the judgments are vacated and the cases remanded for reconsideration in the light of *Witherspoon* v. *Illinois*, 391 U. S. 510.

MR. JUSTICE HARLAN dissents for the reasons stated in MR. JUSTICE BLACK's dissenting opinion in *Witherspoon* v. *Illinois*, 391 U. S. 510, 532.

MR. JUSTICE WHITE dissents for the reasons stated in his dissenting opinion in *Witherspoon* v. *Illinois*, 391 U. S. 510, 540.

MR. JUSTICE BLACK, dissenting.

In all three of these cases the Court remands to the state courts on one single constitutional claim of petitioners *without reaching other constitutional claims raised by them*. The result is that after the state courts rule on the single remand issue this Court will undoubtedly be called on to pass on the other issues which the Court refuses to decide. At the very least this means postponement of a final decision in these cases a year or two years or three years, unless, that is, this Court should, on the second review, choose once more to decide the cases piecemeal. Piecemeal dispositions of criminal cases inevitably cause delays and hamper enforcement of the criminal laws and there is a lot of truth in the old adage that delay is a defendant's best lawyer. See *Witherspoon* v. *Illinois*, 391 U. S. 510, where a murder sentence was reversed nine years after the murder. It

is true that under *Fay* v. *Noia*, 372 U. S. 391, a certain amount of delay is inevitable in criminal cases, but that is not true in these cases where the issues are squarely presented to us here and now.

SPENCE ET AL. *v.* NORTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 759, Misc. Decided June 17, 1968.*

Certiorari granted; No. 759, Misc., 271 N. C. 23, 155 S. E. 2d 802; No. 1311, Misc., 419 S. W. 2d 849; and No. 1823, Misc., 388 F. 2d 409, vacated and remanded.

Sam Houston Clinton, Jr., for petitioner in No. 1311, Misc.

T. W. Bruton, Attorney General of North Carolina, and *Harry W. McGalliard*, Deputy Attorney General, for respondent in No. 759, Misc. *Crawford C. Martin*, Attorney General of Texas, *Nola White*, First Assistant Attorney General, *Hawthorne Phillips* and *Lonny F. Zwiener*, Assistant Attorneys General, and *A. J. Carubbi, Jr.*, for respondent in No. 1311, Misc. *Mr. Martin*, *Miss White*, and *Robert C. Flowers*, *Douglas H. Chilton*, and *Mr. Zwiener*, Assistant Attorneys General, for respondent in No. 1823, Misc.

PER CURIAM.

The motions for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The

*Together with No. 1311, Misc., *Ellison* v. *Texas*, and No. 1823, Misc., *Jackson* v. *Beto, Corrections Director*, both on petitions for writs of certiorari. No. 1311, Misc., is to the Court of Criminal Appeals of Texas, and No. 1823, Misc., to the Court of Appeals for the Fifth Circuit.

judgments of the courts below are vacated and the cases remanded for reconsideration in the light of *Witherspoon* v. *Illinois*, 391 U. S. 510.

MR. JUSTICE BLACK and MR. JUSTICE HARLAN dissent for reasons stated in MR. JUSTICE BLACK's dissenting opinion in *Witherspoon* v. *Illinois*, 391 U. S. 510, 532.

MR. JUSTICE WHITE dissents for the reasons stated in his dissenting opinion in *Witherspoon* v. *Illinois*, 391 U. S. 510, 540.

STREETER *v.* CRAVEN, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 830, Misc. Decided June 17, 1968.

Certiorari granted; vacated and remanded.

Thomas C. Lynch, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Derald E. Granberg*, Deputy Attorney General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Peyton* v. *Rowe*, 391 U. S. 54.

POPE *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 34, Misc. Decided June 17, 1968.

Certiorari granted; 372 F. 2d 710, vacated and remanded.

Wallace M. Rudolph for petitioner.

Solicitor General Griswold, Assistant Attorney General Vinson, Ralph S. Spritzer, Beatrice Rosenberg, and *Jerome M. Feit* for the United States.

PER CURIAM.

The petitioner was convicted by a jury and sentenced to death under the Federal Bank Robbery Act, 18 U. S. C. § 2113 (e). The Solicitor General has filed a memorandum for the United States conceding that this death penalty provision "suffers from the same constitutional infirmity" as that found in the Federal Kidnaping Act, 18 U. S. C. § 1201 (a). *United States* v. *Jackson,* 390 U. S. 570. Accordingly, the Solicitor General concedes that the petitioner's "sentence must be vacated and the cause remanded . . . for resentencing." In light of this concession and upon an independent examination of the record, but without reaching any of the petitioner's other claims, the motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further proceedings consistent with this opinion.

MR. JUSTICE BLACK and MR. JUSTICE WHITE dissent for the reasons stated in the dissenting opinion of MR. JUSTICE WHITE in *United States* v. *Jackson,* 390 U. S. 570, 591.

MR. JUSTICE BLACK dissents for the further reasons stated in his dissenting opinion in *Lopinson* v. *Pennsylvania, ante,* p. 648.

WHEAT *v.* WASHINGTON.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 1301, Misc. Decided June 17, 1968.*

Certiorari granted; 72 Wash. 2d 306, 434 P. 2d 10, vacated and remanded.

Charles M. Stokes for petitioner in No. 1301, Misc. *Anthony Savage, Jr.*, for petitioner in No. 1535, Misc.

James E. Kennedy for respondent in both cases.

PER CURIAM.

The motions for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments of the Supreme Court of Washington are vacated and the cases remanded to that court for reconsideration in the light of *Bruton* v. *United States*, 391 U. S. 123, and *Witherspoon* v. *Illinois*, 391 U. S. 510.

MR. JUSTICE BLACK dissents.

MR. JUSTICE HARLAN dissents for the reasons stated in MR. JUSTICE BLACK's dissenting opinion in *Witherspoon* v. *Illinois*, 391 U. S. 510, 532, and MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States*, 391 U. S. 123, 138.

MR. JUSTICE WHITE dissents for the reasons stated in his dissenting opinions in *Witherspoon* v. *Illinois*, 391 U. S. 510, 540, and *Bruton* v. *United States*, 391 U. S. 123, 138.

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*Together with No. 1535, Misc., *Aiken* v. *Washington*, also on petition for writ of certiorari to the same court.

PUENTES *v.* BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 21.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 562. Decided June 17, 1968.

18 N. Y. 2d 906, 223 N. E. 2d 45; 19 N. Y. 2d 809, 226 N. E. 2d 701, vacated and remanded.

Ernest Fleischman for appellant.

Leo F. McGinity for appellee.

PER CURIAM.

The judgment is vacated and the case is remanded to the Court of Appeals of New York for further consideration in light of *Pickering* v. *Board of Education*, 391 U. S. 563.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the judgment should be reversed.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted and the case set for oral argument.

June 17, 1968. 392 U. S.

HOLLAND ET AL. *v.* HOGAN, DISTRICT ATTORNEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 653. Decided June 17, 1968.

272 F. Supp. 855, vacated and remanded.

Robert Abelow, Marshall C. Berger, and *Donald J. Williamson* for appellants.

Frank S. Hogan, H. Richard Uviller, and *Michael R. Stack,* each *pro se,* and for Yasgur et al., *J. Lee Rankin, Norman Redlich,* and *Stanley Buchsbaum* for Adler, and *Louis J. Lefkowitz,* Attorney General of New York, *pro se,* and *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for Lefkowitz, appellees.

PER CURIAM.

The judgment is vacated and the case is remanded to the United States District Court for further consideration in light of *Gardner* v. *Broderick, ante,* p. 273, and *George Campbell Painting Corp.* v. *Reid, ante,* p. 286.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

HENRY *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 932. Decided June 17, 1968.

Appeal dismissed; certiorari granted; 250 La. 682, 198 So. 2d 889, reversed.

Thomas Barr III for appellant.

Jack P. F. Gremillion, Attorney General of Louisiana, and *William P. Schuler,* Second Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is granted and the judgment is reversed. *Redrup* v. *New York,* 386 U. S. 767.

MR. JUSTICE HARLAN would affirm the judgment of the state court upon the premises stated in his separate opinion in *Roth* v. *United States,* 354 U. S. 476, 496, and in his dissenting opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455.

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MAXWELL, TAX ASSESSOR OF PALM BEACH COUNTY *v.* GOOD SAMARITAN HOSPITAL ASSN., INC.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 1147. Decided June 17, 1968.

204 So. 2d 519, appeal dismissed.

Charles J. Steele for appellant.

Chester Bedell for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

SULLIVAN ET AL. *v.* LITTLE HUNTING PARK, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 1188. Decided June 17, 1968.

Certiorari granted; vacated and remanded.

Allison W. Brown, Jr., Robert M. Alexander, Jack Greenberg, and *James M. Nabrit III* for petitioners.

John Chas. Harris for respondents.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is vacated. The case is remanded to the Supreme Court of Appeals of Virginia for further consideration in light of *Jones* v. *Alfred H. Mayer Co., ante,* p. 409.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE HARLAN's dissenting opinion in *Jones* v. *Alfred H. Mayer Co., ante,* p. 449.

HOPPER ET AL. *v.* LOUISIANA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 1291. Decided June 17, 1968.

Certiorari granted; 251 La. 77, 203 So. 2d 222, vacated and remanded.

Camille F. Gravel, Jr., for petitioners.

Jack P. F. Gremillion, Attorney General of Louisiana, *William P. Schuler*, Second Assistant Attorney General, *Harry H. Howard*, Assistant Attorney General, and *Lawrence L. McNamara* for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is vacated. The case is remanded to the Supreme Court of Louisiana for further consideration in light of *Bruton* v. *United States*, 391 U. S. 123, and *Roberts* v. *Russell*, *ante*, p. 293.

MR. JUSTICE BLACK dissents.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States*, 391 U. S. 123, 138 (1968).

CLARK WALTER & SONS, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 1404. Decided June 17, 1968.

Affirmed.

Howard T. Rosen and *William J. O'Shaughnessy* for appellant.

Solicitor General Griswold, Acting Assistant Attorney General Zimmerman, and *Howard E. Shapiro* for the United States, and *Donald B. Kipp* and *James C. Pitney* for Western Electric Co. et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE FORTAS are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

COPAS *v.* SCHMIDT, SECRETARY OF DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF WISCONSIN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 45, Misc. Decided June 17, 1968.

Certiorari granted; vacated and remanded.

Bronson C. La Follette, Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion to substitute Wilbur J. Schmidt, Secretary, Wisconsin Department of Health and Social Services, as the party respondent is granted. The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are also granted. The judgment is vacated and the case is remanded to the Supreme Court of Wisconsin for further consideration in light of *Mempa* v. *Rhay,* 389 U. S. 128.

WADE *v.* YEAGER, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 857, Misc. Decided June 17, 1968.

Certiorari granted; vacated and remanded.

John G. Thevos for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Bruton* v. *United States*, 391 U. S. 123.

MR. JUSTICE BLACK dissents.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States*, 391 U. S. 123, 138 (1968).

TOLES *v.* CLARK, ATTORNEY GENERAL, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 933, Misc. Decided June 17, 1968.

Certiorari granted; 385 F. 2d 107, vacated and remanded to District Court with directions to dismiss the petition as moot.

Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg, and *Paul C. Summitt* for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Western District of Washington with directions to dismiss the petition as moot.

MR. JUSTICE DOUGLAS dissents.

WEST *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

No. 1127, Misc. Decided June 17, 1968.

Certiorari granted; 253 Cal. App. 2d 348, 61 Cal. Rptr. 216, vacated and remanded.

William A. Dougherty for petitioner.

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Richard D. Huffman,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded for a hearing as provided in *Sims* v. *Georgia,* 385 U. S. 538, and *Jackson* v. *Denno,* 378 U. S. 368.

MR. JUSTICE DOUGLAS is of the opinion that the petition for a writ of certiorari should be granted and the case set for oral argument.

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CARROLL *v.* TEXAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 1224, Misc. Decided June 17, 1968.

Certiorari granted; reversed.

Don Gladden and *Sam Houston Clinton, Jr.*, for petitioner.

Crawford C. Martin, Attorney General of Texas, and *Howard M. Fender*, Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Rideau* v. *Louisiana*, 373 U. S. 723.

THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.

McDANIEL *v.* NORTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 1599, Misc. Decided June 17, 1968.

Certiorari granted; 272 N. C. 556, 158 S. E. 2d 874, vacated and remanded.

T. Wade Bruton, Attorney General of North Carolina, and *George A. Goodwyn,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of North Carolina is vacated and the case is remanded to that court for further consideration in the light of *Harrison* v. *United States, ante,* p. 219.

MR. JUSTICE BLACK dissents for the reasons stated in his dissenting opinion in *Harrison* v. *United States, ante,* p. 226.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Harrison* v. *United States, ante,* p. 226.

MR. JUSTICE WHITE dissents for the reasons stated in his dissenting opinion in *Harrison* v. *United States, ante,* p. 228.

ROBINSON *v.* TENNESSEE.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 1625, Misc. Decided June 17, 1968.

Certiorari granted; reversed.

Jack Greenberg, Michael Meltsner, and *Anthony G. Amsterdam* for petitioner.

George F. McCanless, Attorney General of Tennessee, and *Thomas E. Fox,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Miranda* v. *Arizona,* 384 U. S. 436; *Darwin* v. *Connecticut,* 391 U. S. 346, at 350 (concurring opinion of MR. JUSTICE HARLAN).

MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.

TAGGART *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1668, Misc. Decided June 17, 1968.

20 N. Y. 2d 335, 229 N. E. 2d 581; 21 N. Y. 2d 729, 234 N. E. 2d 714, appeal dismissed.

Leon B. Polsky for appellant.

Thomas J. Mackell and *Peter J. O'Connor* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for failure to file the notice of appeal within the time provided by Rule 11.

MR. JUSTICE BLACK is of the opinion that the appeal should be dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS dissents.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 667 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM JUNE 10 THROUGH JUNE 17, 1968.

JUNE 10, 1968.

Miscellaneous Orders.

No. 69. VOLKSWAGENWERK AKTIENGESELLSCHAFT *v.* FEDERAL MARITIME COMMISSION ET AL., 390 U. S. 261. Upon consideration of motion of petitioner to amend judgment and retax costs, the judgment heretofore issued in this case on April 1, 1968,* is amended to tax one-half of the costs in favor of petitioner and against respondents Pacific Maritime Assn. and Marine Terminals Corp. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Cecelia H. Goetz* and *Richard Whiting* on the motion. *Solicitor General Griswold* and *Robert N. Katz* for the Federal Maritime Commission et al., *R. Frederic Fisher* for Pacific Maritime Assn., and *William W. Schwarzer* for Marine Terminals Corp., in opposition.

No. 1706, Misc. FLETCHER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 1725, Misc. HILL *v.* WARDEN, MARYLAND HOUSE OF CORRECTION; and

No. 1746, Misc. CAMPBELL *v.* CLARK, ATTORNEY GENERAL, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

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*[REPORTER'S NOTE: The judgment and opinion of the Court were dated March 6, 1968.]

Probable Jurisdiction Postponed.

No. 661. ALLEN ET AL. *v.* STATE BOARD OF ELECTIONS ET AL. Appeal from D. C. E. D. Va. Further consideration of question of jurisdiction in this case postponed to hearing of case on the merits. *Jack Greenberg, James M. Nabrit III, Oliver W. Hill, S. W. Tucker,* and *Henry L. Marsh III* for appellants. *Robert Y. Button,* Attorney General of Virginia, and *R. D. McIlwaine III,* Assistant Attorney General, for appellees. *Solicitor General Griswold* and *Assistant Attorney General Pollak* filed a memorandum for the United States by invitation of the Court. Reported below: 268 F. Supp. 218.

No. 1058. FAIRLEY ET AL. *v.* PATTERSON, ATTORNEY GENERAL OF MISSISSIPPI, ET AL.;

No. 1059. BUNTON ET AL. *v.* PATTERSON, ATTORNEY GENERAL OF MISSISSIPPI, ET AL.;

No. 1174. WHITLEY ET AL. *v.* WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL. Appeals from D. C. S. D. Miss. Further consideration of question of jurisdiction in these cases postponed to hearing of the cases on the merits. Cases consolidated and a total of two hours allotted for oral argument. *Denison Ray* and *Lawrence Aschenbrenner* for appellants in Nos. 1058 and 1059. *Armand Derfner, Alvin J. Bronstein,* and *Richard B. Sobol* for appellants in No. 1174. *Joe T. Patterson,* Attorney General of Mississippi, *pro se,* and *William A. Allain* and *Will S. Wells,* Assistant Attorneys General, for appellees in all three cases. *Solicitor General Griswold, Assistant Attorney General Pollak, Louis F. Claiborne, Francis X. Beytagh, Jr.,* and *Nathan Lewin* filed a memorandum for the United States, as *amicus curiae,* by invitation of the Court. Reported below: No. 1058, 282 F. Supp. 164; No. 1059, 281 F. Supp. 918.

Certiorari Granted. (See also No. 135, *ante*, p. 299; No. 1076, *ante*, p. 300; No. 1219, *ante*, p. 301; No. 1407, *ante*, p. 296; No. 78, Misc., *ante*, p. 303; No. 117, Misc., *ante*, p. 304; No. 200, Misc., *ante*, p. 305; No. 279, Misc., *ante*, p. 306; No. 440, Misc., *ante*, p. 297; No. 443, Misc., *ante*, p. 307; No. 548, Misc., *ante*, p. 308; No. 920, Misc., *ante*, p. 293; and No. 1070, Misc., *ante*, p. 298.)

No. 1365. LEARY *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted limited to Questions I and IV, presented by the petition which read as follows:

"I. Whether the registration and tax provisions in 26 U. S. C. Sections 4741 (a), 4742 and 4744 (a), as applied to Petitioner, violate his privilege against self incrimination protected by the Fifth Amendment to the United States Constitution and his rights thereunder as amplified by this Court in three recently decided cases: *Marchetti* v. *U. S.*, 390 U. S. 39 (1968); *Grosso* v. *U. S.*, 390 U. S. 62 (1968); and *Haynes* v. *U. S.*, 390 U. S. 85 (1968)."

"IV. Whether Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U. S. C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana solely from possession thereof."

Robert J. Haft for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 383 F. 2d 851.

No. 1380. PRESBYTERIAN CHURCH IN THE UNITED STATES ET AL. *v.* MARY ELIZABETH BLUE HULL MEMORIAL PRESBYTERIAN CHURCH ET AL. Sup. Ct. Ga. Motion of William P. Thompson, Stated Clerk of the General Assembly of the United Presbyterian Church in the

United States of America, et al., for leave to file a brief, as *amici curiae*, granted. Certiorari granted. *George Wilson McKeag* on the motion. *Robert B. Troutman* and *Charles L. Gowen* for petitioners. *Richard T. Cowan* for Mary Elizabeth Blue Hull Memorial Presbyterian Church, and *Owen H. Page* for Eastern Heights Presbyterian Church et al., respondents. Reported below: 224 Ga. 61, 159 S. E. 2d 690.

No. 1378. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* JACKSONVILLE TERMINAL CO. Dist. Ct. App. Fla., 1st Dist. Certiorari granted. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Lester P. Schoene* and *Neal P. Rutledge* for petitioners. *Paul A. Porter, Dennis G. Lyons, Daniel A. Rezneck,* and *Adam G. Adams II* for respondent. Reported below: 201 So. 2d 253.

Certiorari Denied. (See also No. 1398, *ante*, p. 296; No. 548, Misc., *ante*, p. 308; No. 1221, Misc., *ante*, p. 298; and No. 1637, Misc., *ante*, p. 297.)

No. 399. PRICE *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. *Kenneth C. McGuiness* and *Stanley R. Strauss* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for National Labor Relations Board, and *Bernard Kleiman, Elliot Bredhoff, Michael H. Gottesman,* and *George H. Cohen* for United Steelworkers of America, AFL–CIO, Local Union No. 4028, respondents. Reported below: 373 F. 2d 443.

No. 627. CORNELL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Marvin M. Karpatkin* and *Alan H. Levine* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 384 F. 2d 115.

No. 1089. BLOCK ET AL. *v.* COMPAGNIE NATIONALE AIR FRANCE. C. A. 5th Cir. Certiorari denied. *Lee S. Kreindler, William H. Schroder,* and *Hugh M. Dorsey, Jr.,* for petitioners. *E. Smythe Gambrell* and *Charles A. Moye, Jr.,* for respondent. *Solicitor General Griswold* submitted a memorandum for the United States, as *amicus curiae,* by invitation of the Court. Reported below: 386 F. 2d 323.

No. 1349. BUCHANAN *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *Harold V. Johnson, Jr.,* for petitioner. Reported below: — Ore. —, 436 P. 2d 729.

No. 1353. ELMO CO., INC. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. *George Stephen Leonard* for petitioner. *Solicitor General Griswold, Assistant Attorney General Turner, Howard E. Shapiro, James McI. Henderson,* and *Daniel H. Hanscom* for respondent. Reported below: 128 U. S. App. D. C. 380, 389 F. 2d 550.

No. 1355. BEDDING, CURTAIN & DRAPERY WORKERS UNION, LOCAL 140 OF UNITED FURNITURE WORKERS OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Leonard B. Boudin* and *Victor Rabinowitz* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Allison W. Brown, Jr.,* for respondent. Reported below: 390 F. 2d 495.

No. 1373. PROBRO, INC., DBA LAKEWOOD CLUB *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Ellis J. Horvitz* and *Samuel Goldfarb* for petitioner. *Thomas C. Lynch,* Attorney General of California, and *Kenneth Scholtz,* Deputy Attorney General, for respondent.

No. 1356. GRAY *v.* JOHNSON ET AL. C. A. 10th Cir. Certiorari denied. *Frank T. McCoy* for petitioner. *Solicitor General Griswold, Assistant Attorney General Martz,* and *A. Donald Mileur* for respondents Johnson et al. Reported below: 395 F. 2d 533.

No. 1357. PILKINTON *v.* PILKINTON. C. A. 8th Cir. Certiorari denied. Reported below: 389 F. 2d 32.

No. 1360. AMERICAN CYANAMID CO. *v.* NOPCO CHEMICAL CO. C. A. 4th Cir. Certiorari denied. *W. Brown Morton, Jr.,* and *John T. Roberts* for petitioner. *Jerome G. Lee, George B. Finnegan, Jr., John D. Foley,* and *Otto G. Obermaier* for respondent. Reported below: 388 F. 2d 818.

No. 1362. CANADA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1367. PRESTON PRODUCTS CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *John W. Cummiskey* and *Stephen C. Bransdorfer* for petitioner. *Solicitor General Griswold* for respondent National Labor Relations Board. Reported below: — U. S. App. D. C. —, 392 F. 2d 801.

No. 1368. BELVINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Billy L. Evans* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 391 F. 2d 269.

No. 1370. CAVE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Verne Lawyer* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 390 F. 2d 58.

No. 1374. AN ARTICLE OF DEVICE . . . DIAPULSE MANUFACTURING CORP. OF AMERICA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Milton A. Bass* and *Solomon H. Friend* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul R. Walsh* for the United States. Reported below: 389 F. 2d 612.

No. 1381. HONG KONG & SHANGHAI BANK, HONG KONG (TRUSTEE) LTD. *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO (PARRY ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. *William H. Orrick, Jr.,* for petitioner. *David B. Caldwell* for Parry et al.

No. 1383. REPASS *v.* VREELAND ET AL. C. A. 3d Cir. Certiorari denied. *Milton Diamond* for petitioner. *Peter A. Williams* for respondents. Reported below: 389 F. 2d 981.

No. 1388. KNOX GLASS, INC. *v.* BOWSER & CAMPBELL ET AL. C. A. 3d Cir. Certiorari denied. *Thomas W. Pomeroy, Jr.,* and *Judd N. Poffinberger, Jr.,* for petitioner. Reported below: 390 F. 2d 193.

No. 1395. NICKERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Darrell J. Skelton* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 391 F. 2d 760.

No. 1452. SCARSELLETTI *v.* AETNA CASUALTY & SURETY CO. Sup. Ct. Pa. Certiorari denied.

No. 1411. LUNOW *v.* FAIRCHANCE LUMBER CO. ET AL. C. A. 10th Cir. Certiorari denied. *Leslie L. Conner* and *James M. Little* for petitioner. *Gene H. Henry, Clayton B. Pierce,* and *Edgar R. Fenton* for respondents. Reported below: 389 F. 2d 212.

No. 765. WILLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART would grant certiorari. *Kenneth A. MacDonald* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 384 F. 2d 943.

No. 1324. BRYANT CHUCKING GRINDER CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. *Kenneth C. McGuiness* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent National Labor Relations Board. Reported below: 389 F. 2d 565.

No. 1361. SUMMIT FIDELITY & SURETY CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari and would reverse judgment of the lower court. *Melvin B. Lewis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States.

No. 831, Misc. RICHARDSON *v.* NELSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Derald E. Granberg* and *James B. Cuneo,* Deputy Attorneys General, for respondents.

No. 1178. FRANZEN *v.* TOWNSHIP OF ELK ET AL. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. *Joseph Pierce Lodge* and *Henry D. O'Connor* for petitioner. *Joseph Narrow* for respondents Township of Elk et al.

No. 1329. SOUTHERN CALIFORNIA EDISON CO. *v.* FEDERAL POWER COMMISSION. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Rollin E. Woodbury, Harry W. Sturges, Jr., William E. Marx,* and *William R. Connole* for petitioner. *Solicitor General Griswold, Richard A. Solomon, Peter H. Schiff, Robert L. Russell,* and *Israel Convisser* for respondent. *James W. McCartney* for Transwestern Pipeline Co., intervenor below, in opposition. Reported below: 387 F. 2d 619.

No. 1354. OELSCHLAEGER *v.* UDALL, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Samuel W. McIntosh* for petitioner. *Solicitor General Griswold, Assistant Attorney General Martz,* and *Roger P. Marquis* for respondents. Reported below: —— U. S. App. D. C. ——, 389 F. 2d 974.

No. 1358. DE LUCIA *v.* ATTORNEY GENERAL OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jack Wasserman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Charles Gordon* for respondent. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

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No. 961, Misc. PATILLO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Walter R. Jones,* Deputy Attorney General, for respondent. Reported below: 253 Cal. App. 2d 7, 61 Cal. Rptr. 247.

No. 1026, Misc. JAMES *v.* SUPERIOR COURT OF THE COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Robert M. Snader,* Deputy Attorney General, for Real Estate Commissioner, real party in interest.

No. 1077, Misc. BEATTIE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edward P. O'Brien,* and *Louise H. Renne,* Deputy Attorneys General, for respondent.

No. 1081, Misc. BONNER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Sam Adam, R. Eugene Pincham,* and *Earl E. Strayhorn* for petitioner. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Donald J. Veverka,* Assistant Attorneys General, for respondent. Reported below: 37 Ill. 2d 553, 229 N. E. 2d 527.

No. 1119, Misc. RUIZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Harold Mendelow,* Assistant Attorney General, for respondent. Reported below: 199 So. 2d 478.

No. 1364, Misc. SHEPPARD *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1121, Misc. RILEY *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. *John J. O'Connell,* Attorney General of Washington, and *William E. Howard,* Assistant Attorney General, for respondent.

No. 1137, Misc. BEACHUM *v.* NEW MEXICO; and
No. 1138, Misc. WILLIAMS *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. *Boston E. Witt,* Attorney General of New Mexico, for respondent in both cases. Reported below: 78 N. M. 390, 432 P. 2d 101.

No. 1147, Misc. DEESE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *William P. Schuler,* Assistant Attorney General, for respondent. Reported below: 251 La. 63, 202 So. 2d 663.

No. 1148, Misc. WADDY *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. *Karl P. Warden* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Ed R. Davies* for respondent. Reported below: 383 F. 2d 789.

No. 1130, Misc. OLDHAM *v.* BISHOP, PENITENTIARY SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. *Joe Purcell,* Attorney General of Arkansas, and *Don Langston,* Assistant Attorney General, for respondent.

No. 1236, Misc. SUTTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Charles W. Tessmer* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for respondent. Reported below: 419 S. W. 2d 857.

No. 1187, Misc. VICKERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Nelson Woodson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 703.

No. 1309, Misc. HODGE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Robert F. Hedgepath,* Assistant Attorney General, for respondent.

No. 1337, Misc. LEWIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 433 P. 2d 854.

No. 1369, Misc. SALINAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1374, Misc. CURCIO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 255 Cal. App. 2d 183, 63 Cal. Rptr. 184.

No. 1414, Misc. BROWNE *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1428, Misc. FAIRHURST *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Herman I. Pollock* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1515, Misc. LOWE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 108.

No. 1551, Misc. FORT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1557, Misc. BERKERY *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 390 F. 2d 599.

No. 1558, Misc. MITCHELL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1559, Misc. BURR *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 72 Wash. 2d 38, 431 P. 2d 590.

No. 1561, Misc. LARRANAGA *v.* RODRIGUEZ, ACTING WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1567, Misc. DURAIN *v.* WINGO, WARDEN. Ct. App. Ky. Certiorari denied.

No. 1569, Misc. WILLIAMS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 2 Md. App. 170, 234 A. 2d 260.

No. 1570, Misc. PICHE *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1576, Misc. BAILEY *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 1579, Misc. SILVA *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 387 F. 2d 369.

No. 1584, Misc. BOONE *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1580, Misc. FOOSE *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 389 F. 2d 54.

No. 1583, Misc. HAYNES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 253 Cal. App. 2d 1060, 61 Cal. Rptr. 859.

No. 1585, Misc. COOK *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1586, Misc. TOLLETT *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 1587, Misc. HULL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 391 F. 2d 257.

No. 1588, Misc. EASON *v.* DICKSON, CHAIRMAN, ADULT AUTHORITY OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 390 F. 2d 585.

No. 1598, Misc. KELLER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Leon B. Polsky* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 21 N. Y. 2d 705, 234 N. E. 2d 698.

No. 1600, Misc. JOHNSON *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 1601, Misc. SEARS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied.

No. 1603, Misc. FURTAK *v.* McMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1609, Misc. ZIMMERMAN *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied. *H. Thomas Howell* for petitioner.

No. 1612, Misc. ROZIER *v.* FORDON, PAROLE ADMINISTRATOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1617, Misc. NELSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 200 Kan. 411, 436 P. 2d 885.

No. 1618, Misc. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Frank L. Cowles, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 390 F. 2d 620.

No. 1619, Misc. SCHACK *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 391 F. 2d 608.

No. 1620, Misc. CRAIG *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1622, Misc. FURTAK *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 1630, Misc. CANCEL *v.* DELGADO. C. A. 1st Cir. Certiorari denied. Reported below: 363 F. 2d 105.

No. 1631, Misc. RODRIGUEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1636, Misc. PATRICK *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1633, Misc. MOSDEN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 1644, Misc. SCHACK *v.* FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 391 F. 2d 593.

No. 1645, Misc. RUIZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1650, Misc. SEARFOSS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1651, Misc. FURTAK *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1660, Misc. WELSH *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1661, Misc. NELSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 200 Kan. 411, 436 P. 2d 885.

No. 1663, Misc. CARBRAY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 435 P. 2d 188.

No. 1688, Misc. WINEGAR *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent.

No. 852, Misc. KOLOMYSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. *Solicitor General Griswold* for the United States.

No. 1758, Misc. McDERMOTT *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

Rehearing Granted. (See No. 135, *ante*, p. 299.)

Rehearing Denied.

No. 851, October Term, 1966. MILLER *v.* UNITED STATES, 386 U. S. 911. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 303, Misc., October Term, 1966. CURRY *v.* UNITED STATES, 385 U. S. 873, 387 U. S. 949; and

No. 528. BERGUIDO ET AL. *v.* EASTERN AIRLINES, INC., 390 U. S. 996, 391 U. S. 909. Motions for leave to file second petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 497. HANNER *v.* DEMARCUS ET UX., 390 U. S. 736; and

No. 1185. JOFFE *v.* JOFFE, 390 U. S. 1039. Petitions for rehearing denied.

No. 105. BASS ET AL. *v.* FEDERAL POWER COMMISSION, 390 U. S. 747; and

No. 223. MITTELMAN *v.* UNITED STATES, 389 U. S. 835. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 1163. VIRGO CORP. *v.* PAIEWONSKY, GOVERNOR OF THE VIRGIN ISLANDS, ET AL., 390 U. S. 1041. Petition for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

JUNE 14, 1968.

Dismissal Under Rule 60.

No. 714, Misc. MUNKELWITZ *v.* HENNEPIN COUNTY WELFARE DEPARTMENT. Sup. Ct. Minn. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Harlan E. Smith* for petitioner. *George M. Scott* and *Henry W. McCarr* for respondent. Reported below: 276 Minn. 554, 150 N. W. 2d 24.

JUNE 17, 1968.

Miscellaneous Orders.

No. 17, Orig. NEBRASKA *v.* IOWA.

IT IS ORDERED that the Honorable Charles J. Vogel, Senior Judge of the United States Court of Appeals for the Eighth Circuit, be, and he is hereby, appointed Special Master in this case in the place of the Honorable Walter L. Pope, resigned. The Special Master shall have the authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of the

Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

[For earlier orders herein, see, *e. g.*, 380 U. S. 968.]

No. —. HUJUS *v.* WASHINGTON. Super. Ct. Wash., Island County. Application for supersedeas bond presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. *William B. Holland* for applicant.

No. 73. IN RE RUFFALO, 390 U. S. 544, 391 U. S. 961. The judgment heretofore issued in this case on May 28, 1968,* is amended to omit the provision therein taxing costs in favor of petitioner against the Ohio State and Mahoning County Bar Associations. MR. JUSTICE STEWART took no part in the consideration or decision of this order.

No. 133. ALDERMAN ET AL. *v.* UNITED STATES, 390 U. S. 136, 985, *sub nom.* KOLOD *v.* UNITED STATES.

Motion of the United States to modify our order of January 29, 1968, 390 U. S. 136, restored to calendar for reargument at 1968 Term. Counsel requested to include among issues to be discussed in briefs and oral arguments the following:

(1) Should the records of the electronic surveillance of petitioner Alderisio's place of business be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioners, and if so to what extent?

(2) If *in camera* inspection is authorized or ordered, by what standards (for example, relevance and considera-

*[REPORTER'S NOTE: The judgment and opinion of the Court were dated April 8, 1968.]

tions of injury to persons or to reputations) should the trial judge determine whether the records are to be turned over to petitioners?

(3) What standards are to be applied in determining whether each petitioner has standing to object to the use against him of the information obtained from the electronic surveillance of petitioner Alderisio's place of business? More specifically, does petitioner Alderisio have standing to object to the use of any or all information obtained from such electronic surveillance whether or not he was present on the premises or party to a particular overheard conversation? Also, does petitioner Alderman have standing to object to the use against him of any or all information obtained from the electronic surveillance of petitioner Alderisio's business establishment?

MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

No. 813. SHAPIRO, COMMISSIONER OF WELFARE OF THE STATE OF CONNECTICUT *v.* THOMPSON. Appeal from D. C. Conn. (Probable jurisdiction noted, 389 U. S. 1032);

No. 1134. WASHINGTON ET AL. *v.* LEGRANT ET AL. Appeal from D. C. D. C. (Probable jurisdiction noted, 390 U. S. 940); and

No. 1138. REYNOLDS ET AL. *v.* SMITH ET AL. Appeal from D. C. E. D. Pa. (Probable jurisdiction noted, 390 U. S. 940.) These cases are restored to the calendar for reargument.

No. 1469. PALMIERI *v.* FLORIDA. Sup. Ct. Fla. (Certiorari granted, 391 U. S. 934.) Motion of petitioner for appointment of counsel granted. It is ordered that *Phillip Goldman, Esquire,* of Miami, Florida, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 950. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL.; and

No. 973. HARDIN, PROSECUTING ATTORNEY, ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL. Appeals from D. C. W. D. Ark. (Probable jurisdiction noted, 390 U. S. 941.) Motion for additional time for oral argument denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion. *Robert V. Light* on the motion.

No. 1301. IAQUINTA *v.* NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM ET AL. Ct. App. N. Y. Motion to vacate order of dismissal and for leave to docket appeal denied. [For earlier orders herein, see, *e. g.*, 390 U. S. 1009.]

No. 1331, Misc. BOONE *v.* COPINGER, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. *Francis B. Burch,* Attorney General of Maryland, and *Alfred J. O'Ferrall III,* Assistant Attorney General, for respondent in opposition.

No. 1684, Misc. LUNDBERG *v.* BUCHKOE, WARDEN;

No. 1819, Misc. KOHLFUSS *v.* REINCKE, WARDEN;

No. 1831, Misc. MEUNIER *v.* WISCONSIN;

No. 1855, Misc. SMITH *v.* LLOYD, CORRECTIONAL SUPERINTENDENT;

No. 1857, Misc. NEELY *v.* ROCKVIEW CORRECTIONAL INSTITUTION SUPERINTENDENT;

No. 1869, Misc. RODRIGUEZ *v.* NELSON, WARDEN, ET AL.; and

No. 1875, Misc. HARRIS *v.* RHAY, PENITENTIARY SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1665, Misc. CORD *v.* SMITH ET AL. Motion for leave to file petition for writ of certiorari, mandamus and/or prohibition denied. *Milo V. Olson, William K. Woodburn,* and *Edward D. Neuhoff* on the motion. Respondent *Lyndol L. Young, pro se,* in support of the petition for certiorari.

No. 1627, Misc. BOYDEN *v.* CURTIS, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* for the United States in opposition. Reported below: See 363 F. 2d 551.

No. 1604, Misc. LAWRENCE *v.* TEXAS ET AL.;
No. 1675, Misc. BIGGS *v.* CAMPBELL, CHIEF JUDGE, U. S. DISTRICT COURT;
No. 1708, Misc. BAILEY *v.* MACDOUGALL, CORRECTIONS DIRECTOR;
No. 1709, Misc. DAILEY *v.* SMITH; and
No. 1854, Misc. BIGGS *v.* DOES ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 1638, Misc. SEPULVEDA-CASADOS *v.* SUTTLE, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States in opposition.

No. 1724, Misc. MCLOUGHLIN MANUFACTURING CORP. ET AL. *v.* WRIGHT, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Earl D. Yaffe* and *Jacob E. Yaffe* on the motion. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondents Wright et al. in opposition.

Probable Jurisdiction Noted.

No. 688. STREET *v.* NEW YORK. Appeal from Ct. App. N. Y. Probable jurisdiction noted. *David T. Goldstick, Osmond K. Fraenkel, John J. McAvoy, Alan H. Levine,* and *Melvin L. Wulf* for appellant. *Aaron E. Koota* and *Harry Brodbar* for appellee. Reported below: 20 N. Y. 2d 231, 229 N. E. 2d 187.

No. 1277. UNITED STATES *v.* NARDELLO ET AL. Appeal from D. C. E. D. Pa. Probable jurisdiction noted. *Solicitor General Griswold* and *Assistant Attorney General Vinson* for the United States. *F. Emmett Fitzpatrick, Jr.,* for appellees. Reported below: 278 F. Supp. 711.

Certiorari Granted. (See also No. 559, *ante,* p. 631; No. 932, *ante,* p. 655; No. 941, *ante,* p. 631; No. 1188, *ante,* p. 657; No. 997, *ante,* p. 636; No. 1133, *ante,* p. 647; No. 1291, *ante,* p. 658; No. 34, Misc., *ante,* p. 651; No. 45, Misc., *ante,* p. 660; No. 668, Misc., *ante,* p. 639; No. 759, Misc., *ante,* p. 649; No. 830, Misc., *ante,* p. 650; No. 857, Misc., *ante,* p. 661; No. 933, Misc., *ante,* p. 662; No. 1095, Misc., *ante,* p. 647; No. 1127, Misc., *ante,* p. 663; No. 1201, Misc., *ante,* p. 644; No. 1203, Misc., *ante,* p. 645; No. 1208, Misc., *ante,* p. 645; No. 1224, Misc., *ante,* p. 664; No. 1233, Misc., *ante,* p. 646; No. 1301, Misc., *ante,* p. 652; No. 1311, Misc., *ante,* p. 649; No. 1485, Misc., *ante,* p. 647; No. 1535, Misc., *ante,* p. 652; No. 1599, Misc., *ante,* p. 665; No. 1625, Misc., *ante,* p. 666; No. 1700, Misc., *ante,* p. 647; and No. 1823, Misc., *ante,* p. 649.)

No. 885. IVANOV *v.* UNITED STATES; and

No. 1007, Misc. BUTENKO *v.* UNITED STATES. C. A. 3d Cir.

Motion to amend petition and petition for writ of certiorari in No. 885 granted. Motion for leave to pro-

ceed *in forma pauperis* and petition for writ of certiorari in No. 1007, Misc., granted, and case transferred to appellate docket. Cases set for oral argument immediately following reargument in No. 133, *Alderman et al.* v. *United States, supra,* p. 919. Grants of certiorari in both of these cases limited to the following questions:

On the assumption that there was electronic surveillance of petitioner or a codefendant which violated the Fourth Amendment,

(1) Should the records of such electronic surveillance be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioner, and if so to what extent?

(2) If *in camera* inspection is to be authorized or ordered, by what standards (for example, relevance, and considerations of national security or injury to persons or reputations) should the trial judge determine whether the records are to be turned over to the defendant?

(3) What standards are to be applied in determining whether petitioner has standing to object to the use against him of information obtained from such illegal surveillance? More specifically, if illegal surveillance took place at the premises of a particular defendant,

(a) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?

(b) Does a codefendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?

MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions and these petitions.

Edward Bennett Williams for petitioner in No. 885. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Lee B. Anderson* for the United States in both cases. Reported below: 384 F. 2d 554.

No. 495, Misc. SMITH *v.* HOOEY, JUDGE. Sup. Ct. Tex. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Joe S. Moss* for respondent. *Solicitor General Griswold* filed a memorandum for the United States by invitation of the Court (390 U. S. 937).

No. 753, Misc. HARRIS, U. S. DISTRICT JUDGE (WALKER, REAL PARTY IN INTEREST) *v.* NELSON, WARDEN. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg* and *Charles R. B. Kirk,* Deputy Attorneys General, for respondent. Reported below: 378 F. 2d 141.

No. 1053, Misc. FRANK *v.* UNITED STATES. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *John B. Ogden* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 384 F. 2d 276.

No. 1185, Misc. BENTON *v.* MARYLAND. Ct. Sp. App. Md. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following questions:

(1) Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

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(2) If so, was the petitioner "twice put in jeopardy" in this case?

Case transferred to appellate docket. *H. Thomas Sisk* and *M. Michael Cramer* for petitioner. *Francis B. Burch*, Attorney General of Maryland, and *Edward F. Borgerding*, Assistant Attorney General, for respondent. Reported below: 1 Md. App. 647, 232 A. 2d 541.

Certiorari Denied.

No. 89. STOLLAR *v.* OGILVIE, SHERIFF. Sup. Ct. Ill. Certiorari denied. *Charles A. Bellows* for petitioner. *John J. Stamos, Edward J. Hladis,* and *Ronald Butler* for respondent. Reported below: 36 Ill. 2d 261, 222 N. E. 2d 496.

No. 402. LUCKE *v.* DAVIS, COMMISSIONER OF PERSONNEL OF MARYLAND, ET AL. Ct. App. Md. Certiorari denied. *Leonard J. Kerpelman* for petitioner. *Francis B. Burch,* Attorney General of Maryland, *Thomas A. Garland,* Assistant Attorney General, for respondents. Reported below: 245 Md. 706, 228 A. 2d 313.

No. 924. MARICOPA BY-PRODUCTS, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *John P. Frank* and *John J. Flynn* for petitioners. *Solicitor General Griswold* for the United States.

No. 1387. BECKHAM *v.* MOUTON, COLLECTOR OF REVENUE OF LOUISIANA. Ct. App. La., 2d Cir. and/or Sup. Ct. La. Certiorari denied. *Clarence L. Yancey* for petitioner. Reported below: 204 So. 2d 133.

No. 1396. STEVENS INDUSTRIES, INC. *v.* MARYLAND CASUALTY CO. C. A. 5th Cir. Certiorari denied. *Emmet J. Bondurant* for petitioner. *McChesney H. Jeffries* for respondent. Reported below: 391 F. 2d 411.

No. 1160. YICK CHIN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Joseph S. Hertogs* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for respondent. Reported below: 386 F. 2d 935.

No. 1376. MILGRAM ET AL. *v.* OLD COLONY TRUST CO. ET AL. C. A. 3d Cir. Certiorari denied. *David Berger* and *Herbert B. Newberg* for petitioners. *Henry W. Sawyer III* for respondents Old Colony Trust Co. et al. Reported below: 387 F. 2d 939.

No. 1390. JONES ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Walter A. Raymond* and *Kenneth C. West* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Grant W. Wiprud* for the United States. Reported below: 387 F. 2d 1004.

No. 1406. WESTWARD COACH MANUFACTURING CO., INC., ET AL. *v.* FORD MOTOR CO. C. A. 7th Cir. Certiorari denied. *John P. Price* for petitioners. *Harry T. Ice* and *John R. Spielman* for respondent. Reported below: 388 F. 2d 627.

No. 1392. GUTHRIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *William B. McCollough, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 569.

No. 1397. CATER ET AL. *v.* GORDON TRANSPORT, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Samuel C. Gainsburgh* for petitioners. *Edward Donald Moseley* for respondents. Reported below: 390 F. 2d 44.

No. 1391. COLORADO *v.* FRANC ET AL. Sup. Ct. Colo. Certiorari denied. *Duke W. Dunbar*, Attorney General of Colorado, *William Tucker*, Assistant Attorney General, and *Clifton A. Flowers*, Special Assistant Attorney General, for petitioner. *Marjorie W. McLean* for respondents. Reported below: — Colo. —, 437 P. 2d 48.

No. 1394. SWINGLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *William H. Dempsey, Jr.*, and *Anthony A. Lapham* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg*, and *Sidney M. Glazer* for the United States. Reported below: 389 F. 2d 220.

No. 1410. MIDWESTERN GAS TRANSMISSION CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. *W. C. Braden, Jr., Harry S. Littman, Melvin Richter, Jack Werner, Dale A. Wright, Harold L. Talisman*, and *Harry R. Begley* for petitioners. *Solicitor General Griswold, Richard A. Solomon, Peter H. Schiff*, and *Israel Convisser* for respondent Federal Power Commission, and *Christopher T. Boland, Thomas F. Brosnan, George J. Meiburger*, and *Harry L. Albrecht* for respondent Independent Natural Gas Association of America. Reported below: 388 F. 2d 444.

No. 1413. LITTLE RIVER MARINE CONSTRUCTION CO., INC. *v.* FLAKSA. C. A. 5th Cir. Certiorari denied. *Richard F. Ralph* for petitioner. *Walter H. Beckham* for respondent. Reported below: 389 F. 2d 885.

No. 1444. AMERICAN ACCEPTANCE CORP. *v.* SCHOENTHALER ET AL. C. A. 5th Cir. Certiorari denied. *William Gresham Ward* and *Richard Aaron Kanner* for petitioner. *Charles R. Morgan* and *Harry G. Carratt* for respondents. Reported below: 391 F. 2d 64.

No. 522. LANE *v.* TEXAS. Ct. Crim. App. Tex. Motion to dispense with printing petition granted. Certiorari denied. *Emmett Colvin, Jr.*, for petitioner. *Crawford C. Martin*, Attorney General of Texas, *George M. Cowden*, First Assistant Attorney General, *R. L. Lattimore*, *Howard M. Fender*, and *Robert E. Owen*, Assistant Attorneys General, and *A. J. Carubbi, Jr.*, for respondent. Reported below: 424 S. W. 2d 925.

No. 857. MILLER, AKA COPPOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Steven B. Duke* and *W. Paul Flynn* for petitioner. *Solicitor General Griswold*, *Assistant Attorney General Vinson*, *Beatrice Rosenberg*, and *Mervyn Hamburg* for the United States. Reported below: 381 F. 2d 529.

No. 1200. POWELL *v.* COMMITTEE ON ADMISSIONS AND GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Edmund L. Jones*, *Francis W. Hill, Jr.*, and *Roger Robb* for respondent.

No. 1364. COMMISSIONER OF INTERNAL REVENUE *v.* SUGAR DADDY, INC., ET AL.; and

No. 1389. WEINBERG ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. *Solicitor General Griswold* for petitioner in No. 1364. *Ernest George Williams* for petitioners, and *Mr. Griswold*, *Assistant Attorney General Rogovin*, *Gilbert E. Andrews*, and *Louis M. Kauder* for respondent in No. 1389. Reported below: 386 F. 2d 836.

No. 1393. NUCCIO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jerome Lewis* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul C. Summitt* for the United States.

No. 971. DUMAINE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Guy Johnson* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Assistant Attorney General, and *Jim Garrison* for respondent.

No. 974. IN RE POWELL. C. A. D. C. Cir. Motion to stay order of disbarment denied. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition.

No. 1068. THOMPSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Marshall W. Krause* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* and *Gloria F. DeHart,* Deputy Attorneys General, for respondent. Reported below: 252 Cal. App. 2d 76, 60 Cal. Rptr. 203.

No. 526, Misc. WEAVER *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied. *Thomas L. Shaffer* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *Douglas B. McFadden,* Assistant Attorney General, for respondent. Reported below: 382 F. 2d 251.

No. 1154. WALLACE *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied for the reason that petition was not timely filed. *David S. Haynes* for petitioner.

No. 1090. HENRY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied without prejudice to the bringing of a proceeding for relief in federal habeas corpus. Neither this disposition, nor the proceedings in the Mississippi courts pursuant to our remand, 379 U. S. 443, shall in any way affect petitioner's entitlement to the costs of $1,367.99 ordered in our mandate of March 2, 1965, to be paid petitioner by the State of Mississippi. See 381 U. S. 908 (respondent's motion to retax costs denied). But the proceedings in that regard initiated in the Mississippi Supreme Court by petitioner's motion of April 1, 1965, are still pending and our disposition will enable that court to proceed to effectuate our mandate.

Except with reference to the matter of costs, MR. JUSTICE HARLAN and MR. JUSTICE STEWART would deny certiorari without more.

Robert L. Carter, Barbara A. Morris, Jack H. Young, and *Raymond A. Brown* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, and *G. Garland Lyell, Jr.,* Assistant Attorney General, for respondent. Reported below: 202 So. 2d 40.

No. 1369. SONDEREGGER *v.* HEISS. Ct. App. Cal., 2d App. Dist. Motion to dispense with printing petition granted. Certiorari denied.

No. 1386. BROOKS *v.* UNITED STATES. C. A. 3d Cir. Motion to dispense with printing petition granted. Certiorari denied. *F. Emmett Fitzpatrick* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 392 F. 2d 320.

No. 811, Misc. MURRAY, ADMINISTRATOR *v.* MCNEILL ET AL. C. A. 4th Cir. Certiorari denied. *Josiah S. Murray III, pro se, Robert M. Ward,* and *David A. White* for petitioner. *Gaston H. Gage* for respondents. Reported below: 382 F. 2d 84.

No. 1377. WECHSLER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS dissents. *David I. Shapiro, George Kaufmann, Frank F. Flegal, E. Waller Dudley, Philip F. Herrick, Raymond W. Bergan, Thomas R. Dyson,* and *LeRoy E. Batchelor* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 392 F. 2d 344.

No. 900, Misc. BLEDSOE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *James H. Kline,* Deputy Attorney General, for respondent. Reported below: 252 Cal. App. 2d 727, 60 Cal. Rptr. 703.

No. 921, Misc. BLACKSTONE *v.* OLIVER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edward A. Hinz, Jr.,* and *Daniel J. Kremer,* Deputy Attorneys General, for respondents.

No. 928, Misc. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 384 F. 2d 825.

No. 929, Misc. BLAIR ET AL. *v.* BELL, CHIEF JUSTICE, COURT OF CIVIL APPEALS, ET AL. Sup. Ct. Tex. Certiorari denied. *Orville A. Harlan* for petitioners. *Crawford C. Martin,* Attorney General of Texas, and *Howard M. Fender,* Assistant Attorney General, for respondents.

No. 1191, Misc. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 384 F. 2d 375.

No. 969, Misc. WOLFF *v.* FOLEY. Sup. Ct. Cal. Certiorari denied. *Henry F. Walker* for respondent. *Thomas C. Lynch*, Attorney General, *Miles J. Rubin*, Senior Assistant Attorney General, *Loren Miller, Jr.*, Deputy Attorney General, for the State of California, in opposition.

No. 1014, Misc. FEELEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Clifford L. Schaffer*, Deputy Attorney General, for respondent.

No. 1030, Misc. WEST *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Joel Lewittes*, Assistant Attorney General, for respondent.

No. 1040, Misc. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg*, and *Kirby W. Patterson* for the United States. Reported below: 384 F. 2d 825.

No. 1065, Misc. THORPE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Earl Faircloth*, Attorney General of Florida, and *Charles W. Musgrove*, Assistant Attorney General, for respondent. Reported below: 204 So. 2d 215.

No. 1093, Misc. BONEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *William G. Clark*, Attorney General of Illinois, and *John J. O'Toole* and *Donald J. Veverka*, Assistant Attorneys General, for respondent. Reported below: 38 Ill. 2d 23, 230 N. E. 2d 167.

No. 1088, Misc. MINK *v.* PARKE, DAVIS & CO. ET AL. Sup. Ct. Mich. Certiorari denied. *Earl R. Boonstra* for respondent Upjohn Co.; and *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Solomon H. Bienenfeld*, Assistant Attorney General, for respondent Michigan Corrections Department.

No. 1112, Misc. DAVANEY *v.* FIELD, MENS COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Jack K. Weber*, Deputy Attorney General, for respondent.

No. 1123, Misc. CRANE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *Norman H. Anderson*, Attorney General of Missouri, and *Gerald L. Birnbaum*, Assistant Attorney General, for respondent. Reported below: 420 S. W. 2d 309.

No. 1144, Misc. ALLRED *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. *Julian E. Savage* for petitioner. *Reno S. Harp III*, Assistant Attorney General of Virginia, for respondent. Reported below: 385 F. 2d 360.

No. 1198, Misc. HOBBS *v.* FRYE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1231, Misc. JACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson*, and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 471.

No. 1262, Misc. KOZUCK ET UX. *v.* LAL CONSTRUCTION CO. Sup. Ct. N. J. Certiorari denied.

No. 1273, Misc. BEAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Joe Cannon* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 384 F. 2d 132.

No. 1283, Misc. KORDIC ET UX. *v.* ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for respondent. Reported below: 386 F. 2d 232.

No. 1288, Misc. HOLLOWAY *v.* REINCKE, WARDEN. C. A. 2d Cir. Certiorari denied. *Alan Miles Ruben* for petitioner. *John D. LaBelle* for respondent.

No. 1347, Misc. TORRES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1350, Misc. BAKER *v.* RUSSELL, WARDEN. Sup. Ct. Tenn. Certiorari denied.

No. 1383, Misc. BRETT *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Edith Lowenstein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for respondent. Reported below: 386 F. 2d 439.

No. 1401, Misc. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Murray M. Segal* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 390 F. 2d 317.

No. 1397, Misc. FINNEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Gerald W. Getty, Marshall J. Hartman,* and *James J. Doherty* for petitioner. Reported below: 88 Ill. App. 2d 204, 232 N. E. 2d 247.

No. 1454, Misc. HOGAN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. *James R. Willis* for petitioner. *John T. Corrigan* for respondent.

No. 1457, Misc. HILL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 39 Ill. 2d 125, 233 N. E. 2d 367.

No. 1463, Misc. PIZZARUSSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 388 F. 2d 8.

No. 1474, Misc. LOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 763.

No. 1483, Misc. DEL PIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 386 F. 2d 436.

No. 1563, Misc. STANPHILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 390 F. 2d 650.

No. 1546, Misc. BARNES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 1552, Misc. PANIZZI ET AL., ADMINISTRATORS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.; and No. 1553, Misc. PANIZZI ET AL., ADMINISTRATORS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. C. A. 3d Cir. Certiorari denied. *Paul A. Simmons* for petitioners in both cases. *Francis H. Patrono* for respondent in both cases. Reported below: 386 F. 2d 600.

No. 1573, Misc. RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 388 F. 2d 545.

No. 1577, Misc. HERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 255 Cal. App. 2d 478, 63 Cal. Rptr. 133.

No. 1591, Misc. GODFREY *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Richard J. Bruckner* for petitioner. Reported below: 182 Neb. 451, 155 N. W. 2d 438.

No. 1592, Misc. MAHONEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Orville A. Harlan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 387 F. 2d 616.

No. 1596, Misc. WESTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States.

No. 1597, Misc. RAYMOND *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1602, Misc. GONZALES *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1607, Misc. LEMBKE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1608, Misc. CLINE *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1613, Misc. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1614, Misc. CHESS *v.* BUNTING ET AL. Sup. Ct. Tex. Certiorari denied. *Morton Brauer* for petitioner. *George A. McAlmon, Jr.,* for Bunting, and *Wayne Windle* for Chess, respondents.

No. 1616, Misc. ELLIS *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 1623, Misc. THOMAS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 2 Md. App. 502, 235 A. 2d 777.

No. 1624, Misc. CALLOWAY *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1640, Misc. WINIECKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1634, Misc. WHITE *v.* LEAVITT. C. A. 4th Cir. Certiorari denied.

No. 1635, Misc. GRASSMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 390 F. 2d 793.

No. 1643, Misc. ARCHIE *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied.

No. 1646, Misc. CINNAMON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 1647, Misc. NOWICKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States.

No. 1648, Misc. FOX *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 385 F. 2d 839.

No. 1653, Misc. LANDMAN *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1654, Misc. HALSEY *v.* NITZE, SECRETARY OF THE NAVY, ET AL. C. A. 4th Cir. Certiorari denied. *Howard I. Legum* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 390 F. 2d 142.

No. 1659, Misc. PRINCE *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 1669, Misc. GARDNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1656, Misc. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 255 Cal. App. 2d 584, 63 Cal. Rptr. 359.

No. 1666, Misc. KELLY ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1671, Misc. GOLD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Wilbur D. Dersch* for petitioner. Reported below: 38 Ill. 2d 510, 232 N. E. 2d 702.

No. 1673, Misc. DAUGHERTY, AKA DOUGHERTY *v.* CRAVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1676, Misc. MCEWEN, AKA RAMUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 390 F. 2d 47.

No. 1677, Misc. TOVREA *v.* CITY AND COUNTY OF DENVER. Sup. Ct. Colo. Certiorari denied.

No. 1679, Misc. CHARLES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Paul W. Anderson* for petitioner. *Crawford C. Martin,* Attorney General of Texas, and *Lonny F. Zwiener,* Assistant Attorney General, for respondent. Reported below: 424 S. W. 2d 909.

No. 1680, Misc. FOSTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 389 F. 2d 86.

No. 1683, Misc. HIGGINS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 28 App. Div. 2d 1016, 283 N. Y. S. 2d 699.

No. 1687, Misc. HONEA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 257 Cal. App. 2d 259, 64 Cal. Rptr. 628.

No. 1691, Misc. TERAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1692, Misc. WHITE *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1694, Misc. PAINE *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1696, Misc. PAGE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *John R. Snively* for petitioner. Reported below: 38 Ill. 2d 611, 232 N. E. 2d 689.

No. 1697, Misc. WALKER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1698, Misc. DEBONIS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Peter Murray* and *Richard Newman* for petitioner.

No. 1707, Misc. CAPLER *v.* CITY OF GREENVILLE. Sup. Ct. Miss. Certiorari denied. *Fountain D. Dawson* for petitioner. *J. Robertshaw* for respondent. Reported below: 207 So. 2d 339.

No. 1710, Misc. BLAND *v.* NENNA, WARDEN. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

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No. 1703, Misc. FRANKLIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1704, Misc. FURTAK *v.* McMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1705, Misc. MAHI *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1713, Misc. SCOTT *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1714, Misc. FORBES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1715, Misc. DENMAN *v.* SHUBOW ET AL. C. A. 1st Cir. Certiorari denied. *Elliot L. Richardson*, Attorney General of Massachusetts, and *Oscar S. Burrows*, Assistant Attorney General, for respondents.

No. 1717, Misc. MILLER ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Peter J. O'Connor* for respondent.

No. 1718, Misc. VALENZUELA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1719, Misc. JOHNSON, AKA JOHANSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *George J. Aspland* and *Joseph F. O'Neill* for respondent.

No. 1720, Misc. PICHE *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1740, Misc. RAY ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *William Cahn* and *George Danzig Levine* for respondent.

No. 1722, Misc. ADAIR *v.* WARDEN, MARYLAND PENITENTIARY. Crim. Ct., Baltimore City. Certiorari denied.

No. 1735, Misc. WINTERS *v.* TURNER, WARDEN. Sup. Ct. Utah. Certiorari denied.

No. 1736, Misc. KIDWELL *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Ferdinand Samper* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *Rex P. Killian,* Deputy Attorney General, for respondent. Reported below: —— Ind. ——, 230 N. E. 2d 590.

No. 1738, Misc. HARRISON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1745, Misc. PINEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Donald F. Frost* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1771, Misc. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 390 F. 2d 50.

No. 1821, Misc. SANDS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Arden M. Siegendorf,* Assistant Attorney General, for respondent.

No. 1868, Misc. LYONS *v.* FULTZ. C. A. 5th Cir. Certiorari denied. *Orville A. Harlan* and *Clarke Gable Ward* for petitioner. *Joe S. Moss* for respondent.

No. 1861, Misc. MORFORD *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied. *Melvin Schaengold* for petitioner. *Harvey Dickerson*, Attorney General of Nevada, and *William J. Raggio*, for respondent. Reported below: 394 F. 2d 169.

No. 141, Misc. CARPENTER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William G. Line* for petitioner. Reported below: 181 Neb. 639, 150 N. W. 2d 129.

No. 482, Misc. MUHAMMAD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Anthony F. Marra* for petitioner. *Isidore Dollinger* and *Daniel J. Sullivan* for respondent.

No. 501, Misc. ROBINSON *v.* CIVIL SERVICE COMMISSION, CITY OF CLEVELAND. Ct. App. Ohio, 8th Jud. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Charles E. Mosley, Jr.*, for petitioner. *Daniel J. O'Loughlin* for respondent.

No. 653, Misc. DUPREE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John Jackson Collins* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg*, and *Mervyn Hamburg* for the United States. Reported below: 380 F. 2d 233.

No. 1267, Misc. CLARK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 252 Cal. App. 2d 479, 60 Cal. Rptr. 569.

No. 683, Misc. BRETT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 377 F. 2d 520.

No. 1116, Misc. CRADLE *v.* PEYTON, PENITENTIARY SUPERINTENDENT. Sup. Ct. App. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Albert Teich, Jr.,* for petitioner. *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III,* Assistant Attorney General, for respondent. Reported below: 208 Va. 243, 156 S. E. 2d 874.

No. 1367, Misc. LARA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George A. Blackstone* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *James H. Kline,* Deputy Attorney General, for respondent. Reported below: 67 Cal. 2d 365, 432 P. 2d 202.

No. 1186, Misc. GREEN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Lawrence A. Aschenbrenner* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, and *Guy N. Rogers,* Assistant Attorney General, for respondent. Reported below: 203 So. 2d 470.

No. 1674, Misc. BIGGS *v.* UNITED STATES. Ct. Cl. Certiorari and other relief denied. *Solicitor General Griswold* for the United States.

No. 1242, Misc. BAILEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and the judgment reversed. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 386 F. 2d 1.

No. 1245, Misc. O'BRIEN *v.* INTERSTATE COMMERCE COMMISSION. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Clement Theodore Cooper* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for respondent.

No. 1248, Misc. ROSE *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Motion to supplement petition granted. Certiorari denied. *Bernard A. Berkman* for petitioner. *William B. Saxbe,* Attorney General of Ohio, and *Leo J. Conway,* Assistant Attorney General, for respondent. Reported below: 388 F. 2d 91.

No. 1325, Misc. GREGORY *v.* WARDEN, LEAVENWORTH PENITENTIARY. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for respondent.

No. 1672, Misc. CACHOIAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States. Reported below: 390 F. 2d 654.

No. 1547, Misc. BRENNAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted and the judgment reversed on authority of *Garrity* v. *New Jersey*, 385 U. S. 493. *Joseph L. Belvedere* for petitioner. *Frank S. Hogan, H. Richard Uviller,* and *Alan F. Scribner* for respondent. Reported below: 21 N. Y. 2d 712, 234 N. E. 2d 701.

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No. 410. DUNCAN *v.* LOUISIANA, 391 U. S. 145;

No. 1228. THOMPSON *v.* UNITED STATES, 391 U. S. 903;

No. 1275. BUTTERMAN ET UX. *v.* WALSTON & CO., INC., ET AL., 391 U. S. 913;

No. 1276. DANILA ET AL. *v.* DOBREA, EXECUTOR, 391 U. S. 949;

No. 1298. CIELEN *v.* AETNA LIFE INSURANCE CO., ET AL., 391 U. S. 915;

No. 1027, Misc. SPURLIN *v.* DUTTON, WARDEN, ET AL., 391 U. S. 920;

No. 1404, Misc. KELLY *v.* KANSAS ET AL., 391 U. S. 925;

No. 1446, Misc. JACKSON *v.* NELSON, WARDEN, 391 U. S. 361; and

No. 1459, Misc. STELLO *v.* STRAND ET AL., 391 U. S. 968. Petitions for rehearing denied.

No. 906. ROVICO, INC. *v.* AMERICAN PHOTOCOPY EQUIPMENT CO., 390 U. S. 945, 1037. Motion for leave to file second petition for rehearing denied.

No. 1392, Misc. WALKER *v.* CALIFORNIA, 391 U. S. 362. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 715. KAHN *v.* UNITED STATES, 389 U. S. 1015. Motion for leave to file petition for rehearing denied. MR. JUSTICE DOUGLAS is of the opinion that the petition should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 718. SACHS ET AL. *v.* UNITED STATES, 389 U. S. 1015. Petition for rehearing denied. MR. JUSTICE DOUGLAS is of the opinion that the petition should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1965, 1966, AND 1967

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1965	1966	1967	1965	1966	1967	1965	1966	1967	1965	1966	1967
Number of cases on dockets	17	13	10	1,436	1,469	1,540	1,831	1,874	2,036	3,284	3,356	3,586
Number disposed of during terms	9	5	2	1,182	1,232	1,338	1,502	1,666	1,633	2,693	2,903	2,973
Number remaining on dockets	8	8	8	254	237	202	329	208	403	591	453	613

	TERMS		
	1965	1966	1967
Distribution of cases disposed of during terms:			
Original cases	9	5	2
Appellate cases on merits	282	310	359
Petitions for certiorari	900	922	979
Miscellaneous docket applications	1,502	1,666	1,633

	TERMS		
	1965	1966	1967
Distribution of cases remaining on dockets:			
Original cases	8	8	8
Appellate cases awaiting argument	91	68	65
Appellate cases pending	163	169	137
Miscellaneous docket applications	329	208	403

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3. *Private antitrust suit—Refusal to sell shoe machinery—Treble damages.*—The courts below in this treble damage suit did not err in holding that respondent's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization in the Government's case, as reference to the court's findings and opinion, as well as decree, in that case makes clear. Hanover Shoe v. United Shoe Mach., p. 481.

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hensive statute forbidding every form of racial discrimination affecting the right to purchase or lease property, thereby securing such right against governmental or private interference; and the fact that § 1982 lay partially dormant for many years does not diminish its force today. Jones v. Mayer Co., p. 409.

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2. *Illegally obtained—Testimony by defendant induced by.*—Having illegally placed petitioner's confessions before the jury in the first place, the Government cannot demand that petitioner demonstrate that he would not have testified as he did if his inadmissible confessions had not been used; instead the Government must show that its illegal action did not induce petitioner's testimony, and no such showing was made here. Harrison v. United States, p. 219.

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1. *Establishment and Free Exercise Clauses—New York Education Law.*—New York Education Law, which requires school boards to lend textbooks free of charge to all students in grades seven to 12,

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including those in private schools, does not violate the Establishment or Free Exercise Clause of the First Amendment. The purpose of the statute was the furtherance of educational opportunities for the young, and the law merely makes available to all children the benefits of a general program to lend school books free of charge, and the financial benefit is to parents and children, not to schools. Board of Education v. Allen, p. 236.

2. *Establishment Clause—Taxpayer's suit.*—Taxpayer-appellants here have standing consistent with Article III to invoke federal judicial power since they have alleged that tax money is being spent in violation of a specific constitutional protection against the abuse of legislative power, *i. e.*, the Establishment Clause of the First Amendment. Flast v. Cohen, p. 83.

3. *New York Education Law—Establishment and Free Exercise Clauses.*—In the absence of specific evidence, and based solely on judicial notice, it cannot be concluded that the New York Education Law, which requires school boards to lend textbooks free of charge to all students in grades seven to 12, including those in private schools, results in unconstitutional state involvement with religious instruction or violates the Establishment Clause. Since appellants have not shown that the law coerces them in any way in the practice of religion, there is no violation of the Free Exercise Clause. Board of Education v. Allen, p. 236.

IV. Search and Seizure.

1. *Issuance of warrant—Allegedly obscene motion picture films.*—Admission in evidence of allegedly obscene films seized under warrant issued by justice of the peace on police officer's affidavit giving films' titles, and stating that he had determined from personal observation of the films and the theatre's billboard that they were obscene, was erroneous, as the issuance of the warrant without the justice of the peace's inquiry into factual basis for officer's conclusions fell short of constitutional requirements demanding sensitivity to freedom of expression. Lee Art Theatre, Inc. v. Virginia, p. 636.

2. *Narcotics addicts—Illegal seizure.*—Where policeman observed appellant talking to known narcotics addicts, ordered him out of a restaurant, said, "You know what I am after," reached into appellant's pocket at the same time as appellant, and found envelopes with heroin, he illegally seized the heroin. The search cannot be justified as incident to a lawful arrest since no probable cause existed before the search, and there were no adequate grounds for the officer to search appellant for weapons as the officer had no reason to believe that he was armed and dangerous. Sibron v. New York, p. 40.

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3. *New York "stop and frisk" law.*—Since the question in this Court is not whether the search (or seizure) was authorized by New York's "stop and frisk" law, but whether it was reasonable under the Fourth Amendment, the Court does not pass upon the facial constitutionality of the statute. Sibron v. New York, p. 40.

4. *Prudent policeman—Dangerous situation.*—Where a reasonably prudent policeman is warranted in believing that his safety or that of others is endangered, he may make a reasonable search for weapons of the person believed by him to be armed and dangerous regardless of whether he has probable cause to arrest that individual for crime or the absolute certainty that the individual is armed. Terry v. Ohio, p. 1.

5. *"Stop and frisk" procedures.*—The Fourth Amendment applies to the "stop and frisk" procedures followed here; whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" him, and a careful exploration of the outer surfaces of a person's clothing in an attempt to find weapons is a "search," within the meaning of the Amendment. Terry v. Ohio, p. 1.

6. *Subpoena duces tecum — Warrantless search.* — Warrantless search of respondent union official's office was unreasonable under the Fourth Amendment as the subpoena *duces tecum* issued by the District Attorney himself, does not qualify as a valid search warrant, and this search comes within no exception to the rule requiring a warrant. Mancusi v. DeForte, p. 364.

7. *Suspicious conduct—Incident to arrest.*—Where policeman observed strangers acting suspiciously in hallway of his apartment house, pursued them, collared one, patted him down for weapons and discovered a hard, flat object which he thought might be a knife but which was a kit of burglar's tools, the search was incident to a lawful arrest under the Fourth Amendment. The incident search, which was limited in scope, was justified by the need to seize weapons as well as to prevent destruction of evidence of the crime. Sibron v. New York, p. 40.

8. *Union officer—Standing to object.*—One has standing to object to a search of his office, as well as of his home, and respondent was entitled to expect that records in his custody at his office at union headquarters would not be taken without his permission or that of his union superiors, whether he occupied a "private" office or shared one with other union officials. Respondent thus had standing to object to the admission of the seized papers at his trial. Mancusi v. DeForte, p. 364.

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V. Self-incrimination.

1. *Corporate officer—Personal privilege.*—The constitutional privilege against self-incrimination is "a personal one, applying only to natural individuals," and since appellant corporation cannot avail itself of the privilege it cannot take advantage of the claimed invalidity of a penalty imposed for refusal of an individual, its president, to waive the privilege. Campbell Painting Corp. v. Reid, p. 286.

2. *Public employees—Coercion to relinquish rights.*—Public employees are entitled, like all other persons, to the benefit of the constitutional privilege against self-incrimination and they may not be faced with proceedings which, as here, presented them with a choice between surrendering their constitutional rights or their jobs. Public employees are subject to dismissal if they refuse to account for the performance of their public trust after proper proceedings which do not involve an attempt to coerce them to relinquish their constitutional rights. Sanitation Men v. Sanitation Comm'r, p. 280.

3. *Waiver of immunity—Dismissal of police officer.*—Dismissal of New York City police officer solely for his refusal to waive the immunity to which he is entitled if he is required to testify before a grand jury investigating bribery and police corruption despite his constitutional privilege against self-incrimination, and the New York City Charter provision pursuant to which he was dismissed, cannot stand. Gardner v. Broderick, p. 273.

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1. *Confrontation Clause—Retroactivity of inadmissibility of confession.—Bruton* v. *United States,* 391 U. S. 123, which held that, despite instructions to the jury to disregard implicating statements in determining a codefendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violates the codefendant's Sixth Amendment right to cross-examination, is to be applied retroactively, both to state and federal prosecutions. Roberts v. Russell, p. 293.

2. *Jury trials—Retroactivity.*—Decisions in *Duncan* v. *Louisiana,* 391 U. S. 145, holding that States cannot deny request for jury trial in serious criminal cases, and *Bloom* v. *Illinois,* 391 U. S. 194, holding that the right to jury trials extends to trials for serious criminal contempts, do not apply retroactively. DeStefano v. Woods, p. 631.

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empowered Congress to eliminate included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." Jones v. Mayer Co., p. 409.

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FAIR LABOR STANDARDS ACT. See also **Constitutional Law, I.**

Commerce power—"Enterprise concept" of coverage—State-operated institutions.—The "enterprise concept" (all employees of certain "enterprises" engaged in commerce or production for commerce) of coverage is clearly within the power of Congress under the Commerce Clause, and the commerce power provides a constitutional basis for extension of the Act to state-operated schools and hospitals. Where a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State may be forced to conform its activities to federal regulation. Maryland v. Wirtz, p. 183.

FAMILY AID. See **Social Security Act.**

FEDERAL COMMUNICATIONS ACT OF 1934. See also **Evidence.**

Recording telephone conversations—Orlando, Florida, police—Party line.—Conduct of Orlando police in connecting phone to petitioner's party line and recording conversations clearly amounted to interception of petitioner's communications within the meaning of § 605 of the Act, which prohibits the interception and divulgence (conceded here) of any communications without the sender's authorization. Lee v. Florida, p. 378.

FEDERAL COMMUNICATIONS COMMISSION.

1. *Authority to issue orders—Interim relief.*—FCC has authority to issue "such orders . . . as may be necessary in the execution of its functions," and this order for interim relief, to preserve the situation as of the time of issuance, pending hearings to determine appropriate action, did not exceed or abuse its authority under the Communications Act of 1934. U. S. v. Southwestern Cable Co., p. 157.

2. *Community antenna television systems—Interstate communications—Regulation.*—FCC has authority under the Communications Act of 1934 to regulate community antenna television systems, restricted to that reasonably ancillary to the effective performance of its responsibilities for the regulation of television broadcasting. U. S. v. Southwestern Cable Co., p. 157.

FEDERAL PROGRAMS. See **Constitutional Law, III, 2; Standing to Sue, 1–2; Three-Judge Court.**

FEDERAL REGULATION. See **Constitutional Law, I; Fair Labor Standards Act; Federal Communications Commission.**

FEDERAL-STATE RELATIONS. See **Constitutional Law**, I; **Evidence**; **Fair Labor Standards Act**; **Federal Communications Act of 1934**; **National Banks**; **Social Security Act**; **Taxes.**

FIFTH AMENDMENT. See **Constitutional Law**, V, 1–3.

FILMS. See **Constitutional Law**, IV, 1.

FIRST AMENDMENT. See **Constitutional Law**, III; **Standing to Sue**, 1–2; **Three-Judge Court.**

FLEMMING RULING. See **Social Security Act.**

FLORIDA. See **Evidence**; **Federal Communications Act of 1934.**

FOURTEENTH AMENDMENT. See **Civil Rights**; **Civil Rights Act of 1968**; **Constitutional Law**, III, 1, 3; IV, 2–8; V, 1–3; VI, 1–2; VII; **Procedure**, 1–2, 4–5; **Sentences**; **Social Security Act.**

FOURTH AMENDMENT. See **Constitutional Law**, IV; **Procedure**, 1–2; **Sentences.**

FRANCHISES. See **Antitrust Acts**, 1–2.

FREEDOM OF EXPRESSION. See **Constitutional Law**, IV, 1.

FREE EXERCISE CLAUSE. See **Constitutional Law**, III, 1–3; **Standing to Sue**, 1–2; **Three-Judge Court.**

FULLY DISTRIBUTED COSTS. See **Interstate Commerce Commission.**

GOVERNMENT REGULATION. See **Constitutional Law**, I; **Fair Labor Standards Act**; **Federal Communications Commission.**

GRAND JURIES. See **Constitutional Law**, V, 1–3.

GUNS. See **Constitutional Law**, IV, 4–5.

HEALTH, EDUCATION, AND WELFARE. See **Social Security Act.**

HEARSAY. See **Constitutional Law**, VI, 1; **Procedure**, 4.

HEROIN. See **Constitutional Law**, IV, 2–3, 7; **Procedure**, 1–2; **Sentences.**

HOMES. See **Civil Rights**; **Civil Rights Act of 1968**; **Constitutional Law**, VII.

HOSPITALS. See **Constitutional Law**, I; **Fair Labor Standards Act.**

HOUSING DISCRIMINATION. See **Civil Rights**; **Civil Rights Act of 1968**; **Constitutional Law**, VII.

ILLEGALLY OBTAINED CONFESSIONS. See **Confessions**, 1–2.

ILLEGITIMACY. See **Social Security Act.**

ILLICIT RELATIONSHIPS. See **Social Security Act.**

IMMIGRATION AND NATIONALITY ACT. See also **Jurisdiction,** 2.

Denial of stay of deportation—Jurisdiction to review—Not exclusively in courts of appeals.—Jurisdiction to review the denial by district director of immigration of a stay of deportation, requested by Chinese seaman who had deserted his ship and remained unlawfully in this country, where pertinent order was not entered in a deportation proceeding under § 242 (b) of the Act, is not, under § 106 (a), vested exclusively in the courts of appeals. Cheng Fan Kwok v. Immigration Serv., p. 206.

IMMIGRATION DIRECTOR. See **Immigration and Nationality Act; Jurisdiction,** 2.

IMMUNITY. See **Constitutional Law,** V, 1–3.

IMPELLED TESTIMONY. See **Confessions,** 1–2.

INADMISSIBLE EVIDENCE. See **Confessions,** 1–2.

INFRINGEMENT SUITS. See **Copyright Act of 1909.**

INGOT MOLDS. See **Interstate Commerce Commission.**

INHERENT ADVANTAGES. See **Interstate Commerce Commission.**

INJUNCTIONS. See **Civil Rights; Civil Rights Act of 1968; Constitutional Law,** VII.

IN PARI DELICTO. See **Antitrust Acts,** 2.

INSTRUCTIONS TO JURY. See **Constitutional Law,** VI, 1; **Procedure,** 4.

INTERIM RELIEF. See **Federal Communications Commission,** 1.

INTERMODAL COMPETITION. See **Interstate Commerce Commission.**

INTERROGATION. See **Constitutional Law,** IV, 4–5.

INTERSTATE COMMERCE. See **Constitutional Law,** I; **Fair Labor Standards Act.**

INTERSTATE COMMERCE COMMISSION.

Administrative discretion—National Transportation Policy—Intermodal competition.—The ICC properly exercised its discretion in disallowing the rate reduction proposed by the appellee railroads, to meet the combined barge-truck service rate, which would have been less than their fully distributed costs, as inconsistent with § 15a (3) of the Interstate Commerce Act and the National Transportation Policy, and adequately articulated its reasons for disallowing the proposed rate. American Lines v. L. & N. R. Co., p. 571.

INTERSTATE COMMUNICATIONS. See **Federal Communications Commission**, 1–2.

INTOXICATION. See **Alcoholism**; **Constitutional Law**, II; **Criminal Law.**

INVESTIGATIONS. See **Constitutional Law**, IV, 4–5; V, 1–3.

IRRESISTIBLE URGE. See **Alcoholism**; **Constitutional Law**, II; **Criminal Law.**

ISSUANCE OF WARRANTS. See **Constitutional Law**, IV, 1.

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JUDICIAL REVIEW. See **Immigration and Nationality Act**; **Jurisdiction**, 2.

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JURISDICTION. See also **Constitutional Law**, III, 2; **Immigration and Nationality Act**; **Standing to Sue**, 1–2; **Three-Judge Court.**

1. *Constitutional attack on regulatory scheme—Alternative nonconstitutional ground.*—Three-judge court was properly convened, as the constitutional attack, even though focused on the program's operation in New York City, would if successful affect the entire regulatory scheme of the Elementary and Secondary Education Act of 1965, and the complaint alleged a constitutional ground for relief, albeit coupled with an alternative nonconstitutional ground. Flast v. Cohen, p. 83.

2. *Courts of appeals—Denial of stay of deportation—Nonexclusivity.*—Jurisdiction to review the denial by district director of immigration of a stay of deportation, requested by Chinese seaman who had deserted his ship and remained unlawfully in this country, where pertinent order was not entered in a deportation proceeding under § 242 (b) of the Immigration and Nationality Act, is not, under § 106 (a), vested exclusively in the courts of appeals. Cheng Fan Kwok v. Immigration Serv., p. 206.

JUSTICE OF THE PEACE. See **Constitutional Law**, IV, 1.

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MARYLAND. See **Constitutional Law**, I; **Fair Labor Standards Act.**

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MATCHING FUNDS. See **Social Security Act.**

MEDICAL TREATMENT. See **Alcoholism**; **Constitutional Law**, II; **Criminal Law.**

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MIDAS MUFFLER SHOPS. See **Antitrust Acts**, 1–2.

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MONOPOLIES. See **Antitrust Acts**, 3; **Damages.**

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Not subject to Massachusetts sales tax.—Massachusetts sales tax (which by its terms must be passed on to the purchaser) and use tax are invalid as applied to national banks since such taxes are not among the only four specified methods in addition to taxes on real estate by which, under 12 U. S. C. § 548, Congress has permitted States to tax national banks. Agricultural Bank v. Tax Comm'n, p. 339.

NATIONAL TRANSPORTATION POLICY. See **Interstate Commerce Commission.**

NEGROES. See **Civil Rights; Civil Rights Act of 1968; Constitutional Law, VII.**

NEW YORK. See **Constitutional Law,** III, 1, 3; IV, 2–3, 7; V, 1–3; **Procedure,** 1–2; **Sentences.**

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NEW YORK EDUCATION LAW. See **Constitutional Law,** III, 1, 3.

NEW YORK PUBLIC AUTHORITIES LAW. See **Constitutional Law,** V, 1.

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ORLANDO, FLORIDA. See **Evidence; Federal Communications Act of 1934.**

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OVERTIME PAY. See **Constitutional Law,** I; **Fair Labor Standards Act.**

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PAROCHIAL SCHOOLS. See **Constitutional Law,** III, 1–3; **Standing to Sue,** 1–2; **Three-Judge Court.**

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"PAT-DOWN." See **Constitutional Law,** IV, 4–5.

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PROBABLE CAUSE. See **Constitutional Law**, IV, 2–5, 7; **Procedure**, 1–2; **Sentences.**

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1. *Appeal—Expiration of sentence.*—Completion of service of sentence does not moot an appeal, as the State may not effectively deny a convict access to its appellate courts until his release and then argue that his case is mooted by his failure to do what it has prevented him from doing. Appellant "had a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." Sibron v. New York, p. 40.

2. *Confession of error—Constitutional challenge to state statute.*—Confession of error, though entitled to great weight, does not relieve this Court from making its own examination of the record of a case where a conviction has been erroneously obtained, particularly where a judgment of the State's highest court interpreting a state statute is challenged on constitutional grounds and the confession of error has been made by a local official. Sibron v. New York, p. 40.

3. *Exhaustion of remedies—Prisoner—Confiscation of legal materials.*—It was not necessary for petitioner, who complained that prison authorities confiscated legal materials he had acquired for pursuing an appeal, to exhaust certain state administrative remedies in light of this Court's decisions in *Monroe* v. *Pape*, 365 U. S. 167, 180–183, and other cases. Houghton v. Shafer, p. 639.

PROCEDURE—Continued.

4. *Joint trial — Inadmissibility of confession — Retroactivity.*—*Bruton* v. *United States*, 391 U. S. 123, which held that, despite instructions to the jury to disregard implicating statements in determining a codefendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violates the codefendant's Sixth Amendment right to cross-examination, is to be applied retroactively, both to state and federal prosecutions. Roberts v. Russell, p. 293.

5. *Jury trial in serious criminal cases — Criminal contempts — Retroactivity.*—Decisions in *Duncan* v. *Louisiana*, 391 U. S. 145, holding that States cannot deny request for jury trial in serious criminal cases, and *Bloom* v. *Illinois*, 391 U. S. 194, holding that the right to jury trial extends to trials for serious criminal contempts, do not apply retroactively. DeStefano v. Woods, p. 631.

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Appeal—Expiration of sentence—Mootness.—Completion of service of sentence does not moot an appeal, as the State may not effectively deny a convict access to its appellate courts until his release and then argue that his case is mooted by his failure to do what it has prevented him from doing. Appellant "had a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." Sibron v. New York, p. 40.

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Aid to dependent children—State regulations—Eligibility.—Alabama's substitute father regulation is invalid because it defines "parent" in a manner inconsistent with § 406 (a) of the Act, and in denying assistance to appellees on the basis of the invalid regulation Alabama has breached its federally imposed obligation to furnish aid to families with dependent children with reasonable promptness to all eligible individuals. King v. Smith, p. 309.

SOVEREIGN IMMUNITY. See **Constitutional Law**, I; **Fair Labor Standards Act.**

STANDING TO OBJECT. See **Constitutional Law**, IV, 8.

STANDING TO SUE. See also **Constitutional Law**, III, 2; **Jurisdiction**, 1; **Three-Judge Court.**

1. *Federal taxpayers—Alleged violation of Establishment Clause.*—Taxpayer-appellants here have standing consistent with Article III to invoke federal judicial power since they have alleged that tax money is being spent in violation of a specific constitutional protection against the abuse of legislative power, *i. e.*, the Establishment Clause of the First Amendment. Flast v. Cohen, p. 83.

2. *Federal taxpayers—Challenge to federal spending program.*—There is no absolute bar in Article III of the Constitution to suits by

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federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs since the taxpayers may or may not have the requisite personal stake in the outcome. Flast v. Cohen, p. 83.

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TELEPHONE TAP. See **Constitutional Law**, V, 2; **Evidence**; **Federal Communications Act of 1934.**

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1. *"Inherent advantage."* — National Transportation Policy, 49 U. S. C. preceding § 1. American Lines v. L. & N. R. Co., p. 571.

2. *"Perform."*—§§ 1 (c) and (d), Copyright Act of 1909, 17 U. S. C. §§ 1 (c) and (d). Fortnightly Corp. v. United Artists, p. 390.

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